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D. 84-786-CSY  
Status: GRANTED

Title: Maine, Petitioner  
v.  
Perley Moulton, Jr.

ocketed:  
November 13, 1984

Court: Supreme Judicial Court of Maine

Counsel for petitioner: Moss, Wayne Stuart

Counsel for respondent: Beardsley, Anthony W.

Entry	Date	Note	Proceedings and Orders
1	Oct 5 1984		Application for extension of time to file petition and order granting same until November 14, 1984 (Breanan, October 11, 1984).
2	Nov 13 1984	G	Petition for writ of certiorari filed.
3	Dec 19 1984		DISTRIBUTED. January 11, 1985
4	Jan 7 1985	F	Response requested.
5	Jan 22 1985		Supplemental brief of petitioner Maine filed.
6	Jan 28 1985		Brief of respondent Perley Moulton (Typewritten) in opposition filed.
7	Jan 28 1985	G	Motion of respondent for leave to proceed in forma pauperis filed.
9	Jan 30 1985		REDISTRIBUTED. February 15, 1985
10	Feb 19 1985		Motion of respondent for leave to proceed in forma pauperis GRANTED. Justice Powell OUT.
11	Feb 19 1985		Petition GRANTED. Justice Powell OUT. *****
12	Mar 9 1985	G	Motion of respondent for appointment of counsel filed.
13	Mar 13 1985		DISTRIBUTED. March 22, 1985. (Motion for appointment of counsel).
14	Mar 25 1985		Motion for appointment of counsel GRANTED and it is ordered that Anthony Whitcomb Beardsley, Esquire, of Ellsworth, Maine, is appointed to serve as counsel for the respondent in this case. Justice Powell OUT. Record filed.
15	Mar 23 1985		Order extending time to file brief of petitioner on the merits until April 30, 1985.
17	Apr 1 1984		Order further extending time to file brief of petitioner on the merits until May 6, 1985.
18	Apr 19 1985		Joint appendix filed.
19	May 8 1985		Brief of petitioner Maine filed.
20	May 10 1985		Brief amicus curiae of United States filed.
21	May 13 1985		Brief of respondent Perley Moulton filed.
22	Jun 21 1985		SET FOR ARGUMENT, Tuesday, October 8, 1985. (2nd case)
23	Jul 18 1985		CIRCULATED.
24	Aug 7 1985		
25	Sep 28 1985	X	Reply brief of petitioner Maine filed.
26	Oct 8 1985		ARGUED.

84-786

Office - Supreme Court, U.S.

FILED

NOV 13 1984

No. \_\_\_\_\_

ALEXANDER L. STEVENS

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE,  
Petitioner

V.

PERLEY MOULTON, JR.,  
Respondent

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Sixth Amendment right to counsel is violated under Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), where, in the course of a good faith investigation of crimes for which a defendant has not yet been charged, the police unintentionally obtain in the absence of counsel the defendant's incriminating statements about crimes for which he has already been charged?

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#### OPINIONS BELOW

The opinion of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., Decision No. 3584, Law Docket No. Wal-83-401 (Decided August 16, 1984), which held that the police violated Mr. Moulton's Sixth Amendment right to counsel, is published at 481 A.2d 155 (Me. 1984) and is reproduced in Appendix A to this petition. The Maine Superior Court order finding no violation of Mr. Moulton's Sixth Amendment right to counsel is reproduced in Appendix B to this petition.

#### JURISDICTION

The judgment of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., Decision No. 3584, Law Docket

No. Wal-83-401 (Decided August 16, 1984), was entered on August 16, 1984, and the Court's mandate issued the same day. The sixty-day period provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition would have ended on October 15, 1984. Pursuant to Rule 20.1, Mr. Justice Brennan, by order dated October 11, 1984, extended the State's time for filing its petition for certiorari by 30 days to and including November 14, 1984.

Petitioner State of Maine invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution  
of the United States:

In all criminal  
prosecutions, the accused  
shall enjoy the right to a  
speedy and public trial,  
by an impartial jury of  
the State and district  
wherein the crime shall  
have been committed, which  
district shall have been  
previously ascertained by  
law, and to be informed of  
the nature and cause of  
the accusation; to be  
confronted with the  
witnesses against him; to  
have compulsory process  
for obtaining witnesses in  
his favor, and to have the  
Assistance of Counsel for  
his defense.

STATEMENT OF THE CASE

On April 7, 1981, a Waldo County grand  
jury indicted Perley Moulton, Jr., and Gary  
Colson on three felony counts of theft by

receiving two stolen trucks and stolen auto parts and also a misdemeanor count of theft by receiving a stolen automobile.

On November 4, 1982, Gary Colson met with Robert Keating, Chief of the Belfast City Police Department, to complain that he (Colson) had been receiving threatening telephone calls. App. A at 9-10; App. B at 43-44. On November 6, 1982, Colson met with Respondent Moulton, who revealed his plans to kill Gary Elwell, a State's witness in the criminal case against Moulton and Colson. App. A at 10; App. B. at 44-45. Moulton told Colson that he would telephone Colson later to finalize plans for killing Gary Elwell. (S.H.T. at

26 (Colson); 51 (Keating)).<sup>1</sup>

On November 9 and 10, 1982, Colson again met with police officers who questioned Colson concerning the crimes with which he had been charged. Colson also discussed the threats he had been receiving and Moulton's plan to kill Gary Elwell. App. A at 10; App. B. at 45. Other witnesses in the case, including Gary Elwell, also reported to Chief Keating that they had been threatened either in-person by Perley Moulton or over the telephone. (App. A at 10; S.H.T. at 57-58, 62-63 (Keating)).

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<sup>1</sup> References to pages of the court reporter's transcript (M.R. Crim. P. 39(b)) of the hearing held June 1, 1983, in Maine Superior Court (Waldo County) on Mr. Moulton's motion to suppress his post-indictment statements to Gary Colson shall be in parentheses as follows: (S.H.T. at \_\_\_\_).

On November 12, 1982, Chief Keating gave Colson a recording device to be installed on Colson's telephone. (App. A at 10; App. B at 45; S.H.T. at 50 (Keating)). Between November 21st and approximately Christmas Day of 1982, Colson recorded three telephone conversations initiated by Moulton and turned over the tapes to the police.<sup>2</sup> App. A at 10; App. B. at 45-46. In the last telephone conversation, Moulton told Colson that he planned to meet with Colson at Colson's home on December 26, 1982. App. A at 10-11; App. B at 45.

For this meeting, the police equipped Colson with a body wire transmitter so that the police could listen to and record the

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<sup>2</sup> The recordings of the three Moulton-Colson telephone conversations were not offered at trial.

meeting. The officers' two reasons for the body wire were 1) to protect Colson in the event that Moulton already realized, or should learn in the meeting, that Colson had become a police informant, and 2) to learn more about Moulton's plans for killing and tampering with witnesses. App. A at 11, 13; App. B at 45-46. The police instructed Colson not to question Moulton in their meeting, to avoid trying to draw information out of Moulton, to converse normally, and that he (Colson) could agree or disagree with anything Moulton said. App. A at 16; App. B at 46. Chief Keating was also aware that Moulton and Colson "would probably talk about everything and anything," including the criminal cases where Moulton was already under indictment. App. A at 15; App. B at 46.

In the meeting, Moulton brought up subjects for discussion, and then Colson discussed the subjects with him. (S.H.T. at 38-40 (Colson)). Much of the discussion focused on Moulton's plans for their defense at their upcoming trial on the crimes for which they had already been indicted. During the conversation Moulton made several incriminating statements that were later used against him at trial. App. A at 11.

On April 13, 1983, Respondent Moulton filed in Maine Superior Court (Waldo County) a pre-trial motion to suppress his statements to Colson in the three telephone conversations and the December 26th meeting. The motion was expressly based on the Fifth, Sixth, and Fourteenth Amendments

to the United States Constitution and Me. Const. art. I, § 6. At the suppression hearing, Respondent abandoned his Miranda-based Fifth Amendment challenge to the statements' admissibility, claiming only that the statements were obtained in violation of Moulton's right to counsel under the Sixth Amendment and Me. Const. art. I, § 6. (S.H.T. at 19-19A).

In an "Opinion and Order" filed June 20, 1983, the Suppression Hearing Justice denied Moulton's motion to suppress on the basis of Sixth Amendment law without ever discussing Me. Const. art. I, § 6. The Justice specifically found that Respondent's three telephone conversations and one "body wire" conversation with Colson were recorded for legitimate purposes not

related to the gathering of evidence concerning the crime for which the defendant had been indicted. Testimony shows that the recordings were made in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr. Colson and to gather information concerning defendant Moulton's plans to kill Gary Elwell.

App. B at 48-49. Citing Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Justice ruled that the police here did not "deliberately elicit" or "create a situation likely to induce" Moulton's post-indictment incriminatory statements in the absence of counsel. App. B at 49.

Following his conviction in a jury-waived trial in Maine Superior Court

(Waldo County),<sup>3</sup> Respondent appealed to the Maine Supreme Judicial Court, alleging, inter alia, that the manner in which the police made the body wire recording of his conversation with Colson violated the Sixth Amendment.<sup>4</sup> On review, the Maine Supreme

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<sup>3</sup> Respondent was convicted of Class B and Class C theft (17-A Maine Revised Statutes Annotated (M.R.S.A.) § 353 (1983)) and Class C burglary (17-A M.R.S.A. § 401 (1983)). These crimes were charged in two indictments (Superior Court Docket Nos. CR-83-13 and CR-83-16) out of seven indictments returned by a Waldo County grand jury on January 21, 1983. Since these seven indictments covered the incidents alleged in the original indictments dated April 7, 1981, as well as several new charges, the original indictments against Moulton were subsequently dismissed.

<sup>4</sup> Respondent's appeal from his judgments of conviction in Superior Court Docket Nos. CR-83-13 and CR-83-16 was assigned Law Docket No. Wal-83-401 in the Maine Supreme Judicial Court. The State's appeal from the dismissal on venue grounds of three other indictments against Respondent was assigned Law Docket No. Wal-84-361. The two appeals were decided

Judicial Court found ample evidence to support the finding below that the body wire recording was made "for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted." App. A at 12-13. However, the Court also stated that because Moulton and Colson were friends and codefendants

the police knew, or should have known, that Moulton likely would make

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together in State v. Moulton, Decision No. 3584, 481 A.2d 155 (Me. 1984), which, inter alia, vacated on Sixth Amendment grounds the Superior Court's judgments of conviction in Docket Nos. CR-83-13 and 16. The State is filing this petition for certiorari relative to the Maine Supreme Judicial Court's treatment of the Sixth Amendment issue in Law Docket No. Wal-83-401.

incriminating statements  
at the meeting that Colson  
recorded.

App. A at 15; State v. Moulton, 481 A.2d  
155, 160 (Me. 1984). On this basis, the  
Maine Supreme Judicial Court held that the  
police here violated Henry and Massiah and  
that therefore the Suppression Hearing  
Justice erred in not granting Respondent's  
motion to suppress.

REASON FOR GRANTING THE WRIT

THE MAINE SUPREME JUDICIAL COURT HAS  
DECIDED AN IMPORTANT QUESTION OF SIXTH  
AMENDMENT LAW IN A WAY THAT CONFLICTS  
WITH THIS COURT'S DECISIONS IN MASSIAH  
V. UNITED STATES, BREWER V. WILLIAMS,  
AND UNITED STATES V. HENRY.

In Massiah v. United States, 377 U.S.  
201 (1964), and Brewer v. Williams, 430  
U.S. 387 (1977), this Court held that the  
Sixth Amendment prohibits police

investigatory activities done with the specific intent of extracting from a person in the absence of counsel information about crimes for which he has already been indicted or otherwise charged. See United States v. Henry, 447 U.S. 264, 280 (1980) (Blackmun, J., dissenting). In United States v. Henry, 447 U.S. 264 (1980), this Court affirmed the Massiah rule but sharply divided over whether the facts in Henry constituted a violation of Massiah.

The Maine Supreme Judicial Court's decision in Moulton, finding a Sixth Amendment violation even where the police were not intending to gather evidence of the crimes for which Respondent had been indicted, exposes for consideration the issue in Henry that prompted Justice Powell to write in concurrence and Justice Blackmun joined by Justice White to dissent

- viz., that Henry would be misread so that courts such as the Maine Court would find Sixth Amendment violations in the absence of deliberate, intentional, or purposeful police efforts to obtain post-indictment incriminatory statements.

In Henry, the majority opinion found a Massiah violation in the government's use of an undisclosed informant who was to be paid only if he obtained incriminating statements from Henry, a fellow prisoner awaiting trial. Henry, 447 U.S. at 270. This contingent-fee arrangement meant that the government "must have known" that the paid informant "would take affirmative steps" to elicit information from Henry about the crime for which he had already been indicted, despite the government's

instructions not to question Henry. Henry, 447 U.S. at 271. Justice Powell joined the Court's opinion but wrote separately to emphasize that the Court's holding held true to the Massiah rule, i.e., that the paid informant in Henry did deliberately elicit incriminating information from Henry in violation of Massiah.

Joined by Justice White, Justice Blackmun dissented, objecting that while the majority claimed to retain Massiah's "deliberately elicited" test, the Court was really forging

a new test that saps the word "deliberately" of all significance. The Court's extension of Massiah would cover even a "negligent" triggering of events resulting in reception of disclosures.

Henry, 447 U.S. at 279.<sup>5</sup>

In the instant case, the Maine Supreme Judicial Court misread the majority opinion in Henry in precisely the way that the Henry concurring and dissenting opinions feared. The Maine Court first expressly affirmed the lower court finding that the police body-wired the informant "'for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted.'" App. A at 12-13 (quoting App. B at 48). The Court recognized that the body wire was to protect the informant and

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<sup>5</sup> In a separate dissent Justice Rehnquist argued that Massiah should be overruled and that, in any event, the majority erred in finding that the government had "deliberately elicited" statements from Henry.

investigate threats made against other State's witnesses in the case against Moulton. App. A at 13. The Maine Court then focused, however, on the facts that Moulton and the informant were friends and codefendants and that, on this basis, "the police knew, or should have known, that Moulton likely would make incriminating statements [about the crimes for which he had already been indicted] at the meeting that Colson recorded." App. A at 15. Because it was foreseeable that Moulton would make incriminating statements, the Court ruled that the police's placing of the body wire on Colson, which would record anything Moulton said at their meeting, violated Massiah and Henry.

The unifying theme of Henry, Brewer v. Williams, and Massiah is "the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with the specific intent of extracting information in the absence of counsel." See Henry, 447 U.S. at 280 (Blackmun, J., dissenting). By failing to use this "specific intent" standard and applying instead a test of whether Moulton's post-indictment incriminatory statements were foreseeable, the Maine Court misapprehended the import of Henry and the line of authority on which it is based.<sup>6</sup> This case presents this Court

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<sup>6</sup> The Maine Court's application of the wrong legal standard is significant in that, under the right standard, there was no Sixth Amendment violation because the

with the opportunity to clarify its decisions in this area by holding that police investigation where post-indictment incriminatory statements are foreseeable is not enough for a Sixth Amendment violation - viz., that what the Massiah-Henry rule

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Court's own finding of fact was that the police, in placing the body wire on Colson, had no specific intent to obtain Moulton's post-indictment incriminatory statements. Moreover, the pre-arranged presence of the body wire itself did not give Colson an incentive to elicit, in violation of police instructions, incriminating statements from Moulton about the crimes for which Moulton was already indicted, especially since the purpose of the body wire was to investigate Moulton's unindicted criminal activity. Further evidence of the absence of police elicitation or inducement is that Moulton himself initiated, arranged, and set the agenda for the December 26th meeting, in which Moulton made incriminating statements in the course of presenting his plans for their trial defense.

proscribes is police investigatory activities done with the specific intent of extracting from a person in the absence of counsel information about crimes for which

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The facts of this case are distinguishable from Massiah where the pre-arranged planting of a radio transmitter did give the codefendant-informant in that case, also named Colson, a reason to make sure that he followed the government agent's instructions to discuss with Massiah the crimes for which Massiah had been indicted. See Henry, 447 U.S. at 279 n.2 (Blackmun, J., dissenting). This case is also distinguishable from Henry where the contingent-fee arrangement meant that the government "must have known" that the paid informant "would take affirmative steps" to elicit information from Henry about the crime for which Henry had been indicted. Henry, 447 U.S. at 271.

he has already been indicted or otherwise charged.<sup>7</sup> See Henry, 447 U.S. at 280 (Blackmun, J., dissenting).

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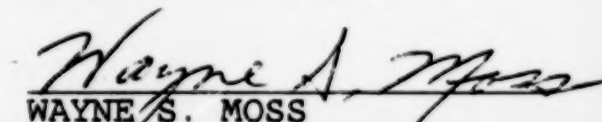
<sup>7</sup> The need for clarification in this area of Sixth Amendment law is illustrated by the direct conflict between the Maine Court's decision in Moulton and the First Circuit's decision in United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982). On similar facts the First Circuit reached the opposite result.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Maine Supreme Judicial Court in State of Maine v. Perley Moulton, Jr., 481 A.2d 155 (Me. 1984).

Respectfully submitted,

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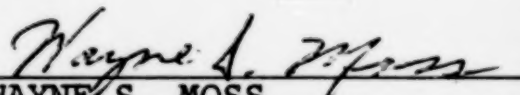
Dated: November 13, 1984

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Petition for a Writ of Certiorari" to be served on the only other party to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

Anthony W. Beardsley, Esquire  
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Dated at Augusta, Maine, this 13th day of November, 1984.

  
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APPENDIX A

MAINE SUPREME JUDICIAL COURT

Reporter of  
Decisions  
Decision No.  
3584  
Law Docket  
Nos.  
Wal-84-361  
Wal-83-401

STATE OF MAINE

v.

PERLEY MOULTON, JR.

Argued May 10, 1984  
Decided August 16, 1984

Before McKUSICK, C.J., and NICHOLS,  
ROBERTS, WATHEN, GLASSMAN, and SCOLNIK, JJ.

McKUSICK, C.J.

Defendant Perley Moulton, Jr. appeals from his convictions for theft, 17-A M.R.S.A. § 353 (1983) (Class B), burglary, 17-A M.R.S.A. § 401 (1983) (Class C), and theft, Class C, entered after a jury-waived trial in Superior Court (Waldo County). Defendant argues that the Superior Court erred by admitting in evidence 1) the

results of a search of the garage premises in Belfast used by defendant and 2) a recording made by the police of defendant's conversations with a co-defendant who was wearing a body wire transmitting device. We reject his appeal as to the search and seizure issue, but agree that the Superior Court should have excluded the evidence obtained by the body wire recordings.

The State appeals from orders of the Superior Court that dismissed three counts of theft against Moulton for lack of proper venue. We agree with the State and remand those counts of theft for restoration to the docket.

In April 1981, a Waldo County grand jury indicted Perley Moulton and Gary Colson on three felony counts of theft by receiving two trucks and some auto parts, in addition to a misdemeanor count of theft by receiving an automobile. Moulton moved to suppress

evidence seized as a result of a search of the garage premises formerly occupied by the auto dealership of Belfast Dodge. By order dated February 11, 1982, the Superior Court denied the motion to suppress as to most of the items involved.

During November and December 1982, meetings were held between co-defendant Gary Colson and Belfast police officers which resulted in a tap being placed on Colson's phone and a wire placed on his body to transmit an in-person conversation Colson had with Moulton. The recordings from the body wire produced additional evidence later used against Moulton.

<sup>1</sup> By decision dated September 9, 1981, a Superior Court justice decided this suppression motion. The parties, however, were unable to obtain a transcript of that suppression hearing and a new hearing was held. The order stemming from the first hearing has delayed no role in subsequent proceedings.

On January 21, 1983, a Waldo County grand jury handed down seven indictments against Moulton. Since the new indictments covered the incidents alleged in the original indictments as well as several new charges, the original indictments against Moulton were subsequently dismissed. Moulton moved to suppress the statements recorded by Gary Colson and again moved to suppress the evidence seized as a result of the search at Belfast Dodge. On June 14, 1983, a different Superior Court justice denied the motion as to the statements made to Colson, and on September 2, 1983, that justice denied the motion as to the Belfast Dodge search on the ground that the issue had already been decided in the February 11, 1982, order.

The seven indictments were disposed of as follows. The Superior Court accepted

defendant's guilty pleas on two indictments for theft (Docket Nos. CR-83-10, 11). Without trial, the court dismissed two indictments for theft (Docket Nos. CR-83-12, 14) for improper venue. On September 6-8, 1983, a jury-waived trial on all the other indictments was held in Superior Court. At the conclusion of the trial, on motion of defendant's counsel, the court dismissed one of the indictments for theft for improper venue (Docket No. CR-83-15). Defendant was found guilty of both theft and burglary (Class C) as charged in two counts in Docket No. CR-83-13 and of theft (Class B) as charged in Docket No. CR-83-16, and he now appeals those convictions. The court found defendant not guilty of the arson charge (Docket No. CR-83-16).

I. State's Appeal: Venue

The three indictments dismissed on venue grounds involved similar fact patterns. In each, the indictment charged that Moulton "did obtain or exercise unauthorized control over the property of another," to wit, three motor vehicles. Moulton allegedly took each vehicle in Penobscot County and brought them into Waldo County.

These indictments track the language of 17-A M.R.S.A. § 353 (1983), which provides:

A person is guilty of theft if he obtains or exercises unauthorized control over the property of another with intent to deprive him thereof.

The Superior Court ruled that, in each case, a completed theft under section 353 occurred prior to the time Moulton brought the vehicles into Waldo County. The crime defined in section 353, however, has a continuing nature and Moulton would continue

in violation of section 353 when he took a stolen vehicle into another county. See Crosby v. State, 232 Ga. 599, 600, 207 S.E.2d 515, 517 (1974); Brown v. State, 281 So. 2d 924, 927 (Miss. 1973). As we said in Mayo v. State, 258 A.2d 269, 270 (Me. 1969), "[i]f goods are stolen in one county and carried by the thief into another county, he may be prosecuted for the crime in either county." In such circumstances, the crime of theft is committed in both counties and, by M.R. Crim. P. 18, the State may choose<sup>2</sup> the county in which to prosecute. People v. Jennings, 10 Cal. App. 3d 712, 89 Cal. Rptr. 268 (1970); State v. Bassett,

<sup>2</sup> We also note--as we did in State v. Terrio, 442 A.2d 537, 540 n.5 (Me. 1982) --that we are aware of no case since the 1930 creation of a single, state-wide Superior Court which has held that a variance in proof of venue as opposed to jurisdiction is fatal.

86 Idaho 277, 284-85, 385 P.2d 246, 250 (1963); Jones v. Commonwealth, 453 S.W.2d 564 (Ky. 1970); 22 C.J.S. Criminal Law § 185(18), at 480 (1961).

We therefore sustain the State's appeal of the dismissal of the three charges of theft for want of proper venue. As a consequence, we remand those cases to the Superior Court for further proceedings. There is no double jeopardy problem with a retrial in Docket No. CR-83-15, which was dismissed at the conclusion of trial. The Superior Court ordered dismissal of that charge on defendant's motion. Before granting defendant's motion the Superior Court made certain that defendant and his counsel understood that dismissal would render defendant subject to prosecution on the same charge in Penobscot County. By seeking dismissal, defendant must run the

risk that the State might prevail on appeal, thereby permitting a retrial. See United States v. Scott, 437 U.S. 82, 99-100 (1978) (dismissal after full trial, on the defendant's motion, for pre-indictment delay).

## II. Defendant's Appeal

### A. Recorded Statements

At trial the State introduced in evidence a recording of a conversation between co-defendants Gary Colson and Perley Moulton. The Superior Court, in a pretrial suppression hearing, had found that the manner in which the police made this recording did not violate Moulton's sixth amendment right to counsel. We reverse.

On November 4, 1982, Gary Colson called Police Chief Keating and said that he had been receiving threats regarding the criminal charges pending against Colson and

Moulton. On November 6, 1982, Colson met with Moulton, at which meeting Moulton allegedly revealed his plans to kill Gary Elwell, a State's witness. Twice within the next four days, Colson met with Chief Keating and Officer Rexford Kelley. Colson discussed the threats he had received from someone other than Moulton, as well as Moulton's plans to kill Elwell and to threaten other witnesses. Chief Keating had previously been informed that other witnesses in the Moulton case had reported receiving threatening phone calls. With Colson's consent, Chief Keating placed a recording device on Colson's phone. Colson recorded three telephone conversations he had with Perley Moulton. Gary Colson

<sup>3</sup> The recordings of the three Colson-Moulton telephone conversations were the subject of a suppression motion, which was denied, but the recordings were not offered at trial.

also arranged to meet Moulton in late December, 1982. In preparation for this meeting, Chief Keating provided Colson with a body wire transmitter. By Colson's use of the body wire, the police were able to record Colson's conversation with Moulton. That lengthy conversation focused on the upcoming trial on the charges against Moulton and Colson. During the conversation Moulton made several incriminating statements that were later used against him at trial.

The sixth amendment requires suppression of an accused's statement if, after the initiation of adversary proceedings, the State, or its agent, has deliberately elicited an incriminating statement, see Massiah v. United States, 377 U.S. 201, 206 (1964), or the State has intentionally created a situation "likely to induce a

defendant to make incriminating statements," see United States v. Henry, 447 U.S. 264, 274 (1980); State v. White, 460 A.2d 1017, 1021 (Me. 1983). The Superior Court found that the State did not deliberately elicit or create a situation likely to induce Moulton to make incriminating statements. On appeal, the justice's ruling on this issue "will be upheld if 'the evidence in the record provides rational support for the conclusions he reached'." Id. (quoting State v. Bleyl, 435 A.2d 1349, 1358 (Me. 1981)).

In its ruling the Superior Court focused upon the motives of the Belfast police officers who dealt with Colson in setting up the body wire recording system. The Superior Court found that the recordings were made "for legitimate purposes not related to the gathering of evidence

concerning the crime for which the defendant had been indicted." On our review, we find ample evidence that supports this conclusion. Chief Keating was concerned about Colson's safety and about gathering information relating to possible threats made against other witnesses in the case against Moulton.

Although, as the police knew, Moulton was represented by counsel and had exercised his right to remain silent, the police were free to gather information via the body wire regarding possible crimes, such as the threats against witnesses, not already the subject of judicial proceedings. See United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982). However, the State's valid purpose in investigating other criminal activity cannot remove from constitutional scrutiny evidence thereby uncovered that relates to

alleged criminal acts for which the right to counsel has already attached. As explained in Massiah:

We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against him at his trial.

377 U.S. at 207 (emphasis in original).

Reference to the State's legitimate motive may be relevant to, but cannot wholly refute, the alleged infringement of Moulton's right to counsel. The State cannot use at trial against Moulton the

fruits of such recording devices where the State should have known that the situation it intentionally created would likely induce Moulton to make incriminating statements. See Henry, 447 U.S. at 271.

The record plainly reveals that the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded. As the Superior Court found, "Chief Keating admitted that by this time [just prior to the Colson-Moulton conversation] he was aware that Colson and Moulton [co-defendants in a multi-count criminal prosecution] would probably discuss their upcoming case at the meeting." The fact that Moulton and Colson were friends and co-defendants was of central importance in this case. That close relationship significantly increased the chance, as Chief

Keating should have known, that Moulton would confide incriminating information to Colson. A defendant's normally cautious approach to dealing with government agents is replaced by an "off-guard" openness when dealing with an undisclosed police informant. Moulton "was more seriously imposed upon because he did not know that his co-defendant was" working with the police. Henry, 447 U.S. at 273; see Massiah, 377 U.S. at 206; Malone v. State, 390 So. 2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981).

The Superior Court found that "Colson was told to try to act like himself, converse normally, and avoid trying to draw information out of Moulton." Even granting that this is an accurate characterization of Colson's mission, this finding in no way suggests that Chief Keating should not have

expected Moulton to incriminate himself. Whether or not Colson intended to question him, or merely engage in conversation, the fact that the conversation would concern the pending charges made it likely that Moulton would incriminate himself. In Henry, an informant contacted the police, who advised him "to be alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry regarding the bank robbery." 447 U.S. at 266. Notwithstanding this finding, the Supreme Court concluded that Henry's statements were obtained in violation of his right to counsel. A review of the transcript of the Colson-Moulton meeting makes clear that Colson was not merely a "passive listener." See United States v. Franklin, 704 F.2d 1183 (10th Cir. 1983). Instead, Colson frequently pressed Moulton

for details of various thefts and in so doing elicited much incriminating information that the State later used at trial. This is precisely what Chief Keating should have anticipated. His advice to Colson to avoid actively questioning Moulton is an insufficient protection where Colson and Moulton were planning to discuss the upcoming criminal trial. By the time the body wire was placed on him, Colson was fully cooperating with the police and no longer stood in the same adversarial position as did Moulton.

When the police recommended the use of the body wire to Colson they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson. The police's valid purpose in investigating

threats against witnesses does not immunize the recordings of Moulton's incriminating statements from constitutional attack. Those statements may be admissible in the investigation or prosecution of charges for which, at the time the recordings were made, adversary proceedings had not yet commenced. But as to the charges for which Moulton's right to counsel had already attached, his incriminating statements should have been ruled inadmissible at trial, given the circumstances in which they were acquired.

B. Search and seizure issues

Although we vacate defendant's three convictions because of the erroneous admission of the body wire recording and so have no necessity of addressing the search and seizure issues, we do so for purposes of judicial economy because the issues are

likely to arise on retrial. See, e.g.,  
State v. Therriault, \_\_\_ A.2d \_\_\_ (Me. 1984);  
Cutillo v. Gerstel, \_\_\_ A.2d \_\_\_ (Me. 1984);  
Boston Milk Producers, Inc. v. Halperin, 446  
A.2d 33, 37 (Me. 1982).

1. Prior adjudication

Moulton argues that the Superior Court  
erred in its order dated September 2, 1983,  
that Moulton was not entitled to relitigate  
the search and seizure issues. The Superior  
Court justice concluded that:

Since the present motion  
addresses the same  
search, the same  
evidence, and the same  
defendant and counsel,  
the fact that the  
defendant has been  
reindicted under a  
different theory of theft  
does not warrant a new  
hearing and order  
concerning the  
admissibility of the same  
evidence against him.

On February 11, 1982, the Superior Court fully considered the arguments relating to the evidence obtained in the search at Belfast Dodge. In a separate proceeding between the same parties, collateral estoppel bars relitigation of issues that were actually litigated in the first proceeding. Restatement (Second) of Judgments, § 27 (1982). This principle is unquestionably a part of the criminal law. Ashe v. Swenson, 397 U.S. 436, 442 (1969); State v. Spearin, 463 A.2d 727, 729-30 (Me. 1983) (applying Ashe); see 21 Am. Jur. 2d Criminal Law § 321 (1981).

The fact that Moulton was reindicted on different theories of theft and additional charges of burglary and arson does not invalidate the prior order made when the State had indicted Moulton only for receiving stolen goods. These changes in

the indictments did not prejudice Moulton's rights in seeking suppression of the fruits of the search and seizure. The charges Moulton faced at the time of the earlier hearing were sufficiently serious that he "had every incentive to litigate" at that hearing "fully and vigorously." Parklane Hosiery v. Shore, 439 U.S. 322, 332 (1979). The new charges did not change any of the issues that would be addressed if the Superior Court had given Moulton yet another suppression hearing. The search at Belfast Dodge was valid or invalid irrespective of the charges on which the State ultimately proceeds. As we discuss below, the probable cause and exigency issues must be resolved based upon facts known to the police at the time of the search. See State v. Fillion, 474 A.2d 187, 189 (Me. 1984). On appeal, defendant's attack must concentrate upon the

Superior Court's February 11, 1982, order denying his suppression motion.

2. Standing

The State argues on appeal that Moulton lacks standing to challenge the validity of the search and seizure at Belfast Dodge. The Superior Court rejected the State's argument, finding that Moulton had a legitimate expectation of privacy in the premises. See Rakas v. Illinois, 439 U.S. 128, 140-41 (1978). The facts of record provide ample support for the Superior Court's conclusion.

Donald Marcia operated the Belfast Dodge dealership until he went out of business at some time prior to January, 1981. At the request of Chrysler Credit Corporation, Marcia maintained a presence at Belfast Dodge to deter vandalism. He used the main building and rented the service bays at the

rear to defendant Perley Moulton, his son-in-law. Moulton, and not Marcia, had the keys to the service bay door locks. Moulton was using the service bays to work on motor vehicles. On these facts, the Superior Court committed no error in concluding that Moulton had enough of an interest in controlling access to the service bays to give him standing to challenge the warrantless search.

3. Probable cause

On December 4, 1980, the Belfast police were informed that auto parts and a pickup truck had been stolen from Lothrop Ford the previous night. The truck was recovered from a lake later that same day. At some later time prior to January 15, 1981, the police received an anonymous tip that the stolen parts could be found at Belfast Dodge.

On January 14, 1981, Richard Fairbrother reported to the Belfast Police Department that one of his dump trucks had been stolen. When Officer Richard Rumney reported to work at the Belfast Police Department at 4:00 p.m. on January 15, 1981, he was told that the police had received an anonymous phone call advising the department that they could find the Fairbrother dump truck at Belfast Dodge. Officer Rumney went to visit Marcia at Belfast Dodge. The Belfast Dodge complex consists of a main building previously used as a showroom and a second building, back from the highway, containing six service bays. Marcia said he could not authorize a search of the service bays. At that time Rumney conducted a search limited to the main building but found nothing.

Officer Rumney continued on his patrol duties until he received a radio call at 11:00 p.m. directing him to a fire near the former Knights of Columbus Hall located in a wooded area off Route 137. Upon reaching the fire scene, which was about a quarter mile from Belfast Dodge, Rumney found a dump truck fitting the description of that stolen from Fairbrother engulfed in flames. Rumney noted that various parts of the truck, such as its fenders, hood, doors, radiator, and so-called West Coast mirrors, had been removed.

Rumney followed the tire tracks from the truck back about 100 feet to Route 137 where the trail ended because the pavement was dry. Officer Raymond Meder, who joined Rumney at the scene, followed footprints in the snow leading away from the fire out to Route 137 and then along the side of that

highway for about a mile in the direction away from Belfast Dodge. These footprints ended at the intersection of Route 137 and Shepherd Road, suggesting that the person making the prints had been picked up by a motorist.

Rumney returned to the Belfast Dodge complex. In the snow on the small road next to the body shop he saw truck tire tracks that resembled those of the Fairbrother truck. The tracks ended in front of bay number four. Rumney saw that bay four was dark, but the first three bays were lighted. Two other bays are located around to the back. As Rumney opened the door to bay four he heard a hissing sound. Rumney entered bay four, discovered that the hissing sound came from an air wrench, and found tools and auto parts that resembled corresponding parts of the Fairbrother truck.

Officer Meder arrived and together with Rumney searched various bays of the body shop. They found no suspects but did find auto parts resembling those reported stolen from Lothrop Ford. Police Chief Keating arrived and, with the help of a Lothrop Ford employee, assisted the other officers in seizing and identifying auto parts. The police posted a guard and, on the basis of the information gained from the initial entry, obtained a search warrant. Armed with that warrant, they seized more tools, auto parts, and a pickup truck.

The Superior Court found that the warrantless search of the premises for a suspect was justified under the exigent circumstances exception to the fourth amendment. To justify such a search, the police must have had both probable cause to believe that a criminal suspect was on the

premises as well as an exigency that precluded them from securing the premises long enough to obtain a search warrant. See State v. Libby, 453 A.2d 481, 484 (Me. 1982); State v. Blais, 416 A.2d 1253, 1256 (Me. 1980). The Superior Court found that "probable cause for a search of the premises for suspects existed in this case." This finding is entitled to deference on appellate review and should be reversed only if "clearly erroneous." See State v. Smith, 379 A.2d 722, 724 (Me. 1977). Such an error exists only if there is no competent evidence to support the Superior Court's conclusion. In addition to facts explicitly found by the Superior Court, we must assume that the Superior Court made all of the findings necessary to its decision. See State v. Walker, 341 A.2d 700, 702 (Me. 1975).

We have held that

Probable cause to search exists when the officers' personal knowledge of facts and circumstances, in combination with any reasonably trustworthy information conveyed to the police, would warrant a prudent person believing that the search would disclose criminal conduct or items that would aid in identifying a criminal or establishing the commission of a crime.

State v. Smith, 379 A.2d at 724. The facts known to the investigating officers gave them ample cause to search the Belfast Dodge complex. The anonymous tips would be of limited import on their own. See Illinois v. Gates, 51 U.S.L.W. 4709, 4713 (1983). By the time of the search, however, the police had discovered substantial information to corroborate the second tip. See Draper v. United States, 358 U.S. 307 (1959); State v.

Blais, 416 A.2d at 1256. On answering the call to the fire, the police discovered Fairbrother's truck. Also, they observed that the truck had been dismantled in a manner that suggested the thief had the use of tools such as those that would be found in a body shop. The location of the truck only a quarter of a mile from the Belfast Dodge complex provided additional support for the conclusion that the informant was correct in telling the police that the truck had at one time been taken to Belfast Dodge. The tire tracks in front of bay four were, in the opinion of Officer Rumney, similar to those that would be made by the tires on the Fairbrother truck. See State v. Heald, 314 A.2d 820, 825 (Me. 1973) (analysis of tracks in snow can be important in establishing probable cause). These facts, along with the tip received by the

police linking Belfast Dodge with the theft of auto parts from Lothrop Ford, gave the officers sound reason to suspect that continuing criminal activity relating to motor vehicles and parts was associated with those premises.

In addition to the ever-present possibility that a suspect will be at his base of operations, several facts known to the investigating officers support the Superior Court's finding that probable cause existed to believe that one or more suspects were on the premises at the time of the search. Although the footprints at the site of the burning Fairbrother truck led away from Belfast Dodge, Officer Meder discovered that they ended along the road, indicating that the person responsible for the fire had been picked up by a motorist. Given the relatively short distance involved, the

police could fairly conclude that this suspect had circled back to Belfast Dodge prior to Officer Rumney's arrival there. The condition of the building indicated that someone may have been on the premises. The lights were still on in at least three of the service bays and some of the padlocks on the doors were left hanging in an unlocked position. These facts suggested to Officers Rumney and Meder that the building had not been locked up for the night but instead was still being used. Taking this information into account, the Superior Court found that, given the field experience of these officers, they had probable cause to believe that a criminal suspect was on the premises.

4. Exigent circumstances

Having probable cause to search, the officers were required to obtain a search warrant unless also there were present

exigent circumstances. Such circumstances exist where there is a compelling need to conduct a search and insufficient time in which to secure a search warrant. See Michigan v. Tyler, 436 U.S. 499, 509 (1978); State v. Johnson, 413 A.2d 931, 933 (Me. 1980). In exigent circumstances, to require the officers to delay the search until they have obtained a warrant "would have a strong likelihood of frustrating the fulfillment of the governmental interest conferring the probable cause to intrude upon the privacy of property." State v. Richards, 296 A.2d 129, 136 (Me. 1972); see also State v. Hassapelis, 404 A.2d 232, 236 (Me. 1979); State v. Barclay, 398 A.2d 794, 797 (Me. 1979). The officers' legitimate concern with apprehending a suspect, see Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit), is heightened in cases involving

particularly dangerous criminal activity. See State v. Johnson, 413 A.2d at 933 (apparently dead body on premises creates exigency); State v. Morse, 394 A.2d 285, 288 n.4 (Me. 1978) (exigency due to person acting wild in area near children); State v. Smith, 379 A.2d at 724 (dangerous suspect). To the officer's knowledge, the suspect or suspects in these crimes, in addition to stealing motor vehicles and parts, had driven one vehicle into a lake and had set another on fire.

The Superior Court found that "[i]t was not possible at that time, with only two officers present, to fully secure the premises while a warrant was obtained." See State v. Blais, 416 A.2d at 1257. "In determining whether exigent circumstances are present, the trial judge must use his own judgment, applied to the evidence before

him; we review his decision only for clear error." State v. Patten, 457 A.2d 806, 810 (Me. 1983). On the record before us we cannot find clear error in the Superior Court's finding of exigent circumstances. The Belfast Dodge complex is quite large. In addition to the main building, a service area is located some 100 feet away and to the rear. The service building consists of six bays, each large enough to hold a motor vehicle, and a seventh room, apparently once used as a bathroom. From what we can discern from the record and a chart introduced as an exhibit, four of the bays are lined up side-by-side. Bay five is behind the first four bays and has a door opening to the side, perpendicular to the line formed by the first four bays. Bay six is behind bays one and two, with a door that opens toward the side, in the opposite

direction of bay five. Thus, there are bays on three sides of the service area complex. Each bay has a door large enough for an automobile to pass through, and there are seven other smaller doors intended for human passage located around the complex. The officers had no way of knowing in which bay or room a suspect might be, and, without first entering the complex, could not know the extent to which a suspect could move around inside from bay to bay. We cannot assume that the officers could have quickly obtained a search warrant in the middle of the night in Belfast. Considering all of these facts, the size of the complex, the number number [sic] of possible exits, the danger posed by the suspect in an auto body shop where tools, vehicles, and flammable liquids would likely be found, and the time of the night, we find competent evidence to

support the Superior Court's conclusion that the officers, even with backup assistance, could not adequately secure the complex for the time it would take to obtain a search warrant. Compare McDonald v. United States, 335 U.S. 451, 455 (1948) (officers able to secure facilities), with State v. Smith, 379 A.2d at 725-26 (officers unable to secure facilities due to danger posed by suspect).

Since we conclude that defendant has failed to show any reversible error in the Superior Court's finding that the officers were justified in entering the building without a search warrant, we must conclude that the officers were entitled to seize the items they saw inside the service bays. The Superior Court found that those items were in plain view. see Coolidge v. New Hampshire, 403 U.S. 443, 465-66 (1971); State v. Mitchell, 390 A.2d 495, 499 (Me.

1978); and on appeal defendant does not challenge that finding. Therefore, not only were these original seizures without a warrant reasonable under the fourth amendment, but also the subsequent search warrant obtained in part on the basis of those items found in plain view was valid. The warrant was not tainted as the fruit of any illegal search.

5. Specificity of search warrant

Defendant's argument that the search warrant and accompanying affidavit in the case at bar did not sufficiently describe the place to be searched and items to be seized is without merit. A warrant adequately identifies the place to be searched if "the officers thereby are enabled to ascertain and identify the place intended by reasonable effort." State v. Brochu, 237 A.2d 418, 422-23 (Me. 1967)

(description of place "known as the dwelling of Armand A. Brochu" adequately describes house, garage, and outbuildings subject to search). The present warrant described with particularity the location of Belfast Dodge and identified the service bays as the area subject to search. Defendant's argument that the warrant did not specify which bays may be searched ignores the fact that the officers had cause to search any and all of the bays. Defendant further argues that the Superior Court should have suppressed all of the items seized pursuant to the search warrant as not having been sufficiently described in the warrant. The Superior Court granted the motion to suppress as to some items; as to the remaining items, we find no reversible error. The attached affidavit supplemented the description contained in the search warrant. See State

v. Corbin, 419 A.2d 362 (Me. 1980). That affidavit listed in detail the number and type of auto parts "stolen from Lothrop Ford in Belfast, Maine on 12/3/80 and body parts removed from a 1978 Maroon 65 series (2) ton Chevrolet dump truck stolen from Richard Fairbrother of Prospect, Maine." The affidavit contained descriptions such as "10 boxes of spark plugs, 1 R-27 Battery, 3 r-55 Batteries...." Under the circumstances, those descriptions were sufficiently detailed.

The entry is:

Superior Court's dismissal of the indictments in Docket Nos. CR-83-12, 14, and 15 vacated.

Superior Court's judgments of conviction in Docket Nos. CR-83-13 and 16 vacated.

Cases remanded to the Superior Court for further proceedings consistent with the opinion herein.

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All concurring.

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NOTICE: This opinion is subject to formal revision before publication in the Maine Reporter. Readers are requested to notify the Reporter of Decisions, Box 368, Portland, Me. 04112, of any typographical or other formal errors before the opinion goes to press.

APPENDIX B

STATE OF MAINE  
WALDO, SS.

SUPERIOR COURT  
Docket Nos.  
CR-83-10,11,12,  
13,14,15 and 16

Date of entry: June 20, 1983

STATE OF MAINE       )  
                          )  
                  V.       )  
                          )  
PERLEY MOULTON J.    )

OPINION AND ORDER

This matter is before the Court upon defendant's motion to suppress any and all statements made by the defendant, Perley Moulton, Jr., obtained directly or indirectly by law enforcement officials or their agents including Gary Colson.

FACTS

On November 4, 1982 Gary Colson called Chief Robert Keating of the Belfast Police Department to express his concern about threatening phone calls he had been receiving. At the time of the call, Mr.

Colson, along with co-defendant Perley Moulton, Jr., had been indicted by the Waldo County Grand Jury for three counts of felony theft and one count of misdemeanor theft. Both Colson and Moulton were represented by counsel and had exercised their right to remain silent. Later in the day Keating and Colson met in a remote area and discussed the anonymous threats Colson had been receiving. During the conversation Mr. Colson expressed an interest in telling Chief Keating about the incidents giving rise to the theft indictments, however Chief Keating told Colson to talk with his lawyer before revealing any information about those alleged criminal activities. On November 6, 1982 Mr. Colson met with co-defendant Moulton at a Belfast restaurant and discussed their upcoming cases. According to Colson, Perley Moulton Jr. formulated

plans at that meeting to kill witness Gary Elwell and discussed a method to accomplish this. On November 9 and 10, Mr. Colson met with Chief Keating and State Police Investigator Rexford Kelley and gave a detailed statement about his and other people's involvement in the thefts for which he was under indictment, and told the investigators of Moulton's plan to do away with at least one witness, and threaten others. In order to monitor the anonymous threatening calls and to learn more about Moulton's plans to kill or threaten witnesses, Chief Keating, with Colson's consent, attached a recording device to Colson's telephone. After a third phone call in which Mr. Moulton, who was residing in New Hampshire at the time, told Mr. Colson of his plans to come to Belfast to see Mr. Colson, Keating and Kelley, with

Colson's permission, attached a listening device, a so called "body wire", to Colson in order to surreptitiously listen to their meeting at Colson's trailer. Keating said they did this to protect Gary Colson and to listen to any plans to kill, threaten, or intimidate witnesses. Chief Keating admitted that by this time he was aware that Colson and Moulton would probably discuss their upcoming case at the meeting. Throughout this period of surveillance that produced the three recorded telephone conversations initiated by Perley Moulton Jr., and one recorded "body wire" conversation that defendant seeks to suppress, Colson was told to try to act like himself, converse normally, and avoid trying to draw information out of Moulton.

DISCUSSION

Since a judicial proceeding had been initiated by indictment against defendant Perly [sic] Moulton Jr. long before Moulton participated in the questioned conversations with codefendant Colson, this was a "critical stage" of the prosecution at which the Sixth Amendment right to the assistance of counsel attaches U.S. v. Henry, 100 S.Ct. 2183, 447 U.S. 264, 65 L. Ed 2d 115 (1980). The statements that defendant Moulton seeks to suppress were incriminating statements made by the accused to an undisclosed police informant. The Sixth Amendment requires suppression of an accused's post indictment statements made to an undisclosed police informant if the statements had been deliberately elicited from the accused by the State or its agent. Massiah v. U.S., 84 S.Ct. 1199, 377 U.S. 201, 12 L. Ed. 2d 246

(1964). Post indictment statements of an accused made to an undisclosed police informant should be suppressed when the State creates a situation likely to induce a defendant to make incriminating statements without the assistance of counsel. U.S. v. Henry, 100 S.Ct. 2183, 447 U.S. 264, 65 L.Ed. 2d 115 (1980); State v. White, No. 3224 (Me. May 24, 1983).

This Court finds that the three telephone conversations and one "body wire" conversations sought to be suppressed by defendant Moulton were recorded for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted. Testimony shows that the recordings were made in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr.

Colson and to gather information concerning defendant Moulton's plans to kill Gary Elwell. Since the State did not deliberately elicit any statements contained in the recordings that relate to the crimes for which the defendant had already been indicted, and since the State did not create a situation likely to induce the defendant to make incriminating statements without the assistance of counsel, this Court finds no reason to suppress the recording and denies the defendant's motion.

June 14, 1983

s/William E. McCarthy

Just. Sup. Ct.

No. 84-786 (2)

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

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STATE OF MAINE,  
Petitioner

V.

PERLEY MOULTON, JR.,  
Respondent

---

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

---

SUPPLEMENTAL BRIEF FOR PETITIONER

---

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REASON FOR GRANTING THE WRIT

THE MAINE SUPREME JUDICIAL  
COURT HAS DECIDED AN  
IMPORTANT QUESTION OF  
SIXTH AMENDMENT LAW  
REQUIRING CLARIFICATION BY  
THIS COURT.

Pursuant to U.S. Sup. Ct. Rule 22.6,  
Petitioner State of Maine files this  
supplemental brief calling this Court's  
attention to the new case of Mealer v.  
Jones, 741 F.2d 1451 (2d Cir. Decided  
August 8, 1984).

In its petition for a writ of  
certiorari, the State of Maine argued that  
by finding a Sixth Amendment violation in  
State of Maine v. Perley Moulton, Jr., 481  
A.2d 155 (Me. 1984), the Maine Supreme  
Judicial Court misunderstood the majority  
opinion in United States v. Henry, 447

U.S. 264 (1980), in precisely the way that the Henry concurring and dissenting opinions feared. The State also noted that the need for clarification in this area of Sixth Amendment law is illustrated by the direct conflict between the Maine Court's decision in Moulton and the First Circuit's decision in United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982) (no Massiah violation where the government obtained the defendant's post-indictment incriminatory statements in the good faith investigation of a separate unindicted crime) (citing Grieco v. Meachum, 533 F.2d 713, 717-18 (1st Cir.), cert. denied, 429 U.S. 858 (1976)). Pet. at 22 n.7. Also illustrative of the need for clarification is the Second Circuit's express rejection in Mealer v. Jones, 741 F.2d 1451 (2d Cir.

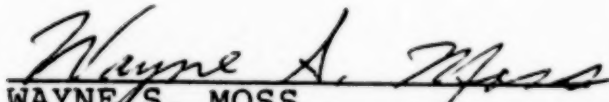
Decided August 8, 1984), of the First Circuit's position in DeWolf.

Significantly, in finding a Sixth Amendment violation in Mealer, the Second Circuit brought itself into direct conflict with the contrary holding of the New York Court of Appeals in the same case, People v. Mealer, 57 N.Y.2d 214, 441 N.E.2d 1080, 455 N.Y.S.2d 562 (1982) (no Sixth Amendment violation because the defendant's post-indictment incriminatory statements were made in response to legitimate, good faith inquiry concerning unindicted criminal activity), cert. denied, 460 U.S. 1024 (1983).

It is therefore respectfully submitted that the State of Maine's petition for a writ of certiorari should be granted because the Maine Supreme Judicial Court

has decided an important question of Sixth Amendment law requiring clarification by this Court. This reason for granting the writ is in addition to the reason stated in the petition itself - viz., that the Maine Supreme Judicial Court has decided an important question of Sixth Amendment law in a way that conflicts with this Court's decisions in Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980).

JAMES E. TIERNEY  
Attorney General

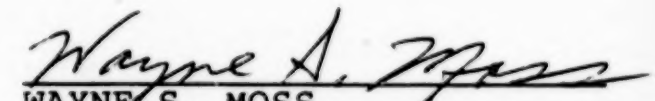
  
WAYNE S. MOSS  
Assistant Attorney General  
State House Station 6  
Augusta, Maine 04333  
(207) 289-2146  
Counsel of Record for  
Petitioner

CERTIFICATE OF SERVICE

I, Wayne S. Moss, Assistant Attorney General for the State of Maine and Counsel of Record for Petitioner, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Supplemental Brief for Petitioner" to be served on the only other party to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

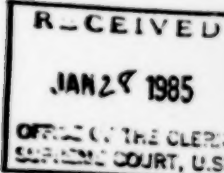
Anthony W. Beardsley, Esquire  
SILSBY & SILSBY  
Silsby Building  
Ellsworth, Maine 04605

Dated at Augusta, Maine, this 15th day of January, 1985.

  
WAYNE S. MOSS  
Assistant Attorney General  
State House Station 6  
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(207) 289-2146  
Counsel of Record for  
Petitioner

ORIGINAL

No. 84-786



IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE  
Petitioner

v.

PERLEY MOULTON, JR.,  
Respondent

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

RESPONSE TO PETITION FOR  
A WRIT OF CERTIORARI

ANTHONY W. BEARDSLEY, ESQUIRE  
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Respondent

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY  
AT THE TIME OF FILMING. IF AND WHEN A  
BETTER COPY CAN BE OBTAINED, A NEW FICHE  
WILL BE ISSUED.

QUESTION PRESENTED FOR REVIEW

Whether the Sixth Amendment right to counsel is violated under Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), where, in the course of a good faith investigation of crimes for which a defendant has not yet been charged, the police unintentionally obtain in the absence of counsel the defendant's incriminating statements about crimes for which he has already been charged?

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REASON FOR NOT GRANTING THE WRIT

The Maine Supreme Judicial Court has not interpreted the Sixth Amendment law in a manner requiring clarification by this Court.

In its Petition for a Writ of Certiorari, the State of Maine has argued that the Maine Supreme Court misinterpreted the Sixth Amendment law in a way that conflicts with the Court's decision in Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980).

Although the police may have arguably been investigating a separate crime when the co-defendant, Colson, was wired for conversation, the police or their agents knew or should have known that Moulton would make incriminating statements when the agent's questions were not made regarding the new crime but were deliberately asking for incriminating answers for the old crime. The incriminating statements made regarding the old crime certainly would be suppressed following the logic of any of the three above cited cases.

The State of Maine further argues that there is a conflict between the Maine Supreme Judicial Court's decision in Moulton and the First Circuit's decision in United States v. DeWolf, 696 F. 2d 1 (1st Cir. 1982).

The Maine Supreme Court agrees with the DeWolf decision in so far as introducing defendant's statements relating to a separate crime when obtained in the good-faith investigation. Moulton goes one step further in explaining that this does not apply when "the police knew, or should have known, that Moulton likely would make incriminating statements" regarding the old crime. This issue was not addressed by DeWolf and therefore is not in conflict. Because there is no conflict between DeWolf

and Moulton, this particular Writ of Certiorari should not be granted just because there may be a conflict between DeWolf (1st. Circuit) and Mealer (2nd Circuit).

The evidence in Moulton is more than sufficient to bolster the defendant's contention that the police and their agent did deliberately elicit and did create a situation likely to induce Moulton's post indictment incriminatory statements in the absence of counsel, with this finding, the defendant's statements would be suppressable under Massiah, De Wolf, Henry, or Mealer.

It is therefore respectfully submitted that the State of Maine's Petition for a Writ of Certiorari should not be granted because the Maine Supreme Judicial Court decision does not conflict with this Court's decision in Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980) or the First Circuit's decision in United States v. DeWolf, 696 F. 2d 1 (1st Cir. 1982).

*Anthony W. Beardsley*  
 Anthony W. Beardsley, Esq.  
 SILSBY & SILSBY  
 P.O. Box 449  
 Ellsworth, Maine 04605  
 Counsel of Record for  
 Respondent

# CERTIFICATE OF SERVICE

I, Anthony W. Beardsley, Esquire, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Objection to Petition for a Writ of Certiorari" to be served on the only other party to this proceeding by depositing said copies in the United States Mail, postage prepaid, addressed to Petitioner's Counsel of Record, Wayne S. Moss, Ass't. Attorney General, as follows:

Wayne S. Moss  
 Assistant Attorney General  
 State House Station 6  
 Augusta, Maine 04333

Dated at Ellsworth, Maine, this 18th day of January, 1985.

*Anthony W. Beardsley*  
 Anthony W. Beardsley, Esquire  
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 Counsel of Record for  
 Respondent

No. 84-786

3

Office-Supreme Court, U.S.  
FILED

MAY 8 1985

IN THE SUPREME COURT OF THE UNITED STATES

ALEXANDER J. STEVAS,  
CLERK

OCTOBER TERM, 1984

STATE OF MAINE,  
Petitioner

V.

PERLEY MOULTON, JR.,  
Respondent

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED NOVEMBER 13, 1984  
CERTIORARI GRANTED FEBRUARY 19, 1985

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RELEVANT DOCKET ENTRIES

STATE OF MAINE V. PERLEY MOULTON, JR.

MAINE SUPERIOR COURT  
DOCKET NO. CR-81-38

4/7/81-Grand Jury return indictment into Court charging the Defendant with three counts of theft by receiving, date of indictment, April 7, 1981.

4/9/81-Deft. present in Court with Counsel, Anthony Beardsley, Esq. William Anderson present for State. Deft. acknowledges receipt of copy of Indictment and is arraigned by the Court. Reading waived. Plea: Not Guilty.

6/7/83-Dismissal under Rule 48(a) filed by Asst. D.A. for the following reason, to wit: Due to Re-Indictment in these matters.

6/7/83-Dismissal entered.

MAINE SUPERIOR COURT  
DOCKET NO. CR-81-39

4/7/81-Grand Jury return indictment into Court charging the Defendant with theft by receiving. Date of Indictment, April 7, 1981.

4/9/81-Deft. present in Court with Counsel, Anthony Beardsley, Esq. William Anderson present for State. Deft. acknowledges receipt of copy of Indictment and is arraigned by the Court. Reading waived. Plea: Not Guilty.

10/21/82-Motion to Sever dtd. Oct. 20, 1982, filed by Deft.

11/5/82-Anthony Beardsley for Deft. and William Anderson for State. Hearing had on Motion to Sever CR-81-39 from the case of State of Maine vs. Gary Colson, docket no. CR-81-37. After hearing, Motion Denied. (Alexander, J.)

6/7/83-Dismissal under Rule 48(a) filed by Asst. D.A. for the following reason, to wit: Due to Re-Indictment in these matters.

6/7/83-Dismissal entered.

MAINE SUPERIOR COURT  
DOCKET NO. CR-83-13

1/21/83-Grand Jury return indictment into court charging the defendant with burglary, class C and theft, Class C.

3/1/83-Deft. present in Hancock County Superior Court with Counsel for arraignment. Deft. acknowledges

receipt of copy of Indictment and is arraigned by the Court. Reading waived. Plea: NOT GUILTY.

4/13/83-Motion to Suppress dtd. March 28, 1983, filed.

6/1/83-Defts. Perley Moulton and Donald Marcia present in Court with their respective counsel, Anthony Beardsley for Moulton and William Ferm for Marcia, for hearing on motions. William Anderson for State. Testimonial hearing had on Motion to Suppress of Perley Moulton. After hearing, matter taken under advisement.

6/20/83-Opinion and Order dtd. June 14, 1983, received, filed and entered. (McCarthy, J. -- Since the State did not deliberately elicit any statements contained in the recordings that relate to the crimes for which the deft. had already been indicted, and since the State did not create a situation likely to induce the deft. to make incriminating statements without the assistance of counsel, this Court finds no reason to suppress the recording and denies the deft's motion.

9/6/83-After recess, Deft. files waiver of jury trial. Court makes inquiry of deft. and after inquiry, waiver approved by the Court. Cases CR-83-13, 15 and 16

consolidated for trial before the Court.

9/8/83-After argument by counsel and a recess Court finds defendant guilty as charged and he convicted in CR-83-13 of Count I, Burglary and Count II, Theft, both class C; In CR-83-16 defendant found guilty of Count II, Theft, Class B. Deft. found Not Guilty of Arson, Class A, Count I of CR-83-16 and is discharged as to Count I.

9/26/83-Deft. present in Court with counsel, Anthony Beardsley, Esq. William Anderson for State. Deft. having been found guilty by jury of Burglary and Theft in CR-83-13 and of Theft in CR-83-16 is adjudged guilty as charged and convicted and is placed at the bar for sentence in these matters and in other cases. Pre-Sentence report reviewed by Court, counsel and deft. Sentence: In CR-83-10, 11, and both counts of CR-83-13, deft. committed to Maine State Prison for one year. In CR-83-16, Ct. II, deft. committed to Maine State Prison for four years, all suspended, and placed on probation for two years, with special condition.

MAINE SUPERIOR COURT  
DOCKET NO. CR-83-16

1/21/82-Grand Jury return indictment into Court charging the defendant with arson, class A and Theft, Class B.

3/1/83-Deft. present in Hancock County Superior Court with Counsel for arraignment. Deft. acknowledges receipt of copy of Indictment and is arraigned by the Court. Reading waived. Plea: NOT GUILTY.

4/13/83-Motion to Suppress dtd. March 28, 1983, filed.

6/1/83-Defts. Perley Moulton and Donald Marcia present in Court with their respective counsel, Anthony Beardsley for Moulton and William Ferm for Marcia, for hearing on motions. William Anderson for State. Testimonial hearing had on Motion to Suppress of Perley Moulton. After hearing, matter taken under advisement.

6/20/83-Opinion and Order dtd. June 14, 1983, received, filed and entered. (McCarthy, J.--Since the State did not deliberately elicit any statements contained in the recordings that relate to the crimes for which the deft. had already been indicted, and since the State did not create a situation likely to induce the

deft. to make incriminating statements without the assistance of counsel, this Court finds no reason to suppress the recording and denies the deft's motion.

9/6/83-After recess, Deft. files waiver of jury trial. Court makes inquiry of deft. and after inquiry, waiver approved by the Court. Cases CR-83-13, 15 and 16 consolidated for trial before the Court.

9/8/83-After argument by counsel and a recess Court finds defendant guilty as charged and he convicted in CR-83-13 of Count I, Burglary and Count II Theft, both class C. In CR-83-16 defendant found guilty of Count II, Theft, Class B. Deft. found Not Guilty of Arson, Class A, Count I of CR-83-16 and is discharged as to Count I.

9/26/83-Deft. present in Court with counsel, Anthony Beardsley, Esq. William Anderson for State. Deft. having been found guilty by jury of Burglary and Theft in CR-83-13 and of Theft in CR-83-16 is adjudged guilty as charged and convicted and is placed at the bar for sentence in these matters and in other cases. Pre-Sentence report reviewed by Court, counsel and deft. Sentence: In CR-83-10, 11, and both counts of CR-83-13, deft. committed to Maine State

Prison for one year. In CR-83-16, Ct. II, deft. committed to Maine State Prison for four years, all suspended, and placed on probation for two years, with special condition.

INDICTMENTS

MAINE SUPERIOR COURT  
DOCKET NO. CR-81-38

STATE OF MAINE  
V.  
PERLEY MOULTON, JR.

INDICTMENT FOR VIOLATION OF  
17-A M.R.S.A. §§ 359 & 802  
Theft by Receiving (Class C) (Counts I & III)  
Theft by Receiving (Class B) (Count II)

THE GRAND JURY CHARGES:

COUNT I

That on or about the 16th day of January, 1981, in the City of Belfast, County of Waldo and the State of Maine, Perley Moulton Jr. did receive, retain, or dispose of the property of another, to wit one 1978 Ford Pick-up truck having a value in excess of One Thousand Dollars (\$1,000), the property of William Meucci, knowing that it had been stolen or believing that it had probably been stolen, with the

intention to deprive the said William Meucci thereof.

COUNT II

That on or about the 16th day of January, 1981, in the City of Belfast, County of Waldo and the State of Maine, Perley Moulton Jr. did receive, retain, or dispose of the property of another, to wit one 1978 Chevrolet Dump Truck having a value in excess of Five Thousand Dollars (\$5,000), the property of Richard Fairbrother, knowing that it had been stolen or believing that it had probably been stolen, with the intention to deprive the said Richard Fairbrother thereof.

COUNT III

That on or about the 16th day of January, 1981, in the City of Belfast, County of Waldo and the State of Maine, Perley Moulton Jr. did receive, retain, or

dispose of the property of another, to wit assorted Ford Motor Company automotive parts having a value in excess of One Thousand Dollars (\$1,000), the property of Lothrop Ford, Inc., knowing that it had been stolen or believing that it had probably been stolen, with the intention to deprive the said Lothrop Ford, Inc., thereof.

Date: 7 April 1981      A True Bill

s/Grand Jury Foreman  
Foreman

MAINE SUPERIOR COURT  
DOCKET NO. CR-81-39

STATE OF MAINE  
V.  
PERLEY MOULTON, JR.

INDICTMENT FOR VIOLATION OF  
17-A M.R.S.A. § 359  
Theft by Receiving (Class D)

THE GRAND JURY CHARGES:

That on or about the 23rd day of January, 1981, in the City of Belfast, County of Waldo and the State of Maine, Perley Moulton Jr. did receive, retain, or dispose of the property of another, to wit one 1970 Mustang automobile the property of Donald Martin, knowing that it had been stolen or believing that it had probably been stolen, with the intention to deprive the said Donald Martin thereof.

A True Bill

Date: 7 April 1981      s/Grand Jury Foreman  
Foreman

MAINE SUPERIOR COURT  
DOCKET NO. CR-83-13

STATE OF MAINE  
V.  
PERLEY MOULTON, JR.

INDICTMENT FOR VIOLATION OF  
17-A M.R.S.A. §§ 401 & 353  
Burglary (Class C) (Count I)  
Theft (Class C) (Count II)

THE GRAND JURY CHARGES:

COUNT I

That on or about the 3rd day of  
December, 1980, in the City of Belfast,  
County of Waldo and State of Maine, Perley  
Moulton, Jr. did enter or surreptitiously  
remain in a structure, to wit the place of  
business of Lothrop Ford Incorporated, the  
property of Lothrop Ford Incorporated,

knowing that he was not licensed or  
privileged to do so, with the intent to  
commit the crime of theft therein.

COUNT II

On or about the 3rd day of December,  
1980, in the City of Belfast, County of  
Waldo and State of Maine, Perley Moulton,  
Jr. did obtain or exercise unauthorized  
control over the property of another, to  
wit; assorted Ford Motor Company automotive  
parts and one Ford pickup truck having an  
aggregate value in excess of \$1,000.00 the  
property of Lothrop Ford Incorporated, with  
the intent to deprive the owner thereof.

A True Bill

Date: 21 January 1983      s/Stephen J. Hall  
Foreman

MAINE SUPERIOR COURT  
DOCKET NO. CR-83-16

STATE OF MAINE

V.

PERLEY MOULTON, JR.

INDICTMENT FOR VIOLATION OF  
17-A M.R.S.A. §§ 802 & 353  
Arson (Class A) (Count I)  
Theft (Class B) (Count II)

THE GRAND JURY CHARGES:

COUNT I

That on or about the 15th day of  
January, 1981, in the City of Belfast,  
County of Waldo and State of Maine, Perley  
Moulton, Jr. did start, cause or maintain a  
fire or explosion on the property of  
another, to wit; one 1978 Chevrolet Dump  
Truck the property of Richard Fairbrother,  
with the intent to damage or destroy  
property thereon.

COUNT II

That on or about the 14th day of  
January, 1981, in the City of Belfast,  
County of Waldo and State of Maine, Perley  
Moulton, Jr. did obtain or exercise  
unauthorized control over the property of  
another, to wit one 1978 Chevrolet Dump  
Truck, having a value in excess of  
\$5,000.00 the property of Richard  
Fairbrother, with the intent to deprive the  
said Richard Fairbrother thereof.

A True Bill

Date: 21 January 1983 s/Stephen J. Hall  
Foreman

MOTION TO SUPPRESS

STATE OF MAINE                      MAINE SUPERIOR COURT  
V.                                      DOCKET NO. CR-83-13,16  
PERLEY MOULTON, JR.

NOW COMES the defendant, Perley Moulton, Jr., by and through his attorney, Anthony W. Beardsley, of the law firm of Silsby & Silsby, Ellsworth, Maine, and moves to suppress:

1. Any and all statements made by the defendant, Perley Moulton, Jr., obtained directly or indirectly by law enforcement officials or their agents, including statements made to Gary Coleson, regarding the above captioned matter due to the fact that the defendant was not given proper miranda warnings prior to obtaining these statements.

2. Any and all physical evidence seized by law enforcement agents from the

buildings located on the Belfast Dodge lot, Route 137, Belfast, Maine, on or about January 16, 1981. This suppression is sought because of an illegal search and seizure by police officers who conducted both an illegal warrantless search and an illegal search with a search warrant.

3. Any and all statements made by the defendant, Perley Moulton, Jr., obtained directly or indirectly by law enforcement officials or their agents including Gary Coleson, regarding the above captioned matter due to the fact that the defendant's attorney had not been contacted prior to interviews with the Defendant by police agents including Gary Coleson when they knew that defendant had a lawyer and that the defendant had previously indicated that he did not want to make statements without a lawyer present.

4. Any and all statements made by the defendant and any and all physical evidence not mentioned in the above motions which were obtained directly or indirectly by police agents as a result of obtaining information from the defendant illegally and as a result of evidence received in the improper search of the buildings located on the above mentioned Belfast Dodge lot.

These motions are made on the grounds that the defendant was deprived of his rights under the fourth, fifth, sixth and fourteenth amendments to the Constitution of the United States of America, and article 1, sections 5 and 6 of the Constitution of the State of Maine.

The defendant, Perley Moulton, Jr., contends that the search was not a consent search at the Belfast Dodge garage, that there were no search warrants justifying

the actions of the officers, that the searches were otherwise unlawful in accordance with the law, and that statements made by the defendant, Perley Moulton, Jr., were without the benefit of his lawyer being present and without the benefit of miranda warnings being read to him.

DATED: March 28, 1983

s/Anthony W. Beardsley  
Anthony W. Beardsley, Esquire  
Silsby & Silsby  
Silsby Building  
Ellsworth, Maine 04605  
Attorney for Defendant

(Certificate of Service omitted in printing)

REPORTER'S TRANSCRIPT OF  
HEARING ON MOTION TO SUPPRESS

STATE OF MAINE                      MAINE SUPERIOR COURT  
V.                                      DOCKET NO. CR-83-13,16  
PERLEY MOULTON, JR.

June 1, 1983  
The Honorable William E. McCarthy,  
Presiding Justice

Appearances: William Anderson for State  
Anthony W. Beardsley for  
Defendant

[12]

\* \* \*

THE COURT: Okay.

MR. BEARDSLEY: There's a third issue,  
and this relates to Perley Moulton, Jr. It  
relates to the prosecution wiring the  
co-defendant, and this is after I had made  
motions to sever on their cases -- the  
co-defendant cooperated with the police,  
got together with them and helped to  
commence interrogation of my client ---  
well, they got together, and they wired a

conversation with my client, and I'm trying  
to suppress that conversation, and my main  
reason is that they knew he had counsel, he  
had already been indicted, and what they  
were trying to do is to have him try and  
get my client to make admissions.

\* \* \*

[19]

\* \* \*

MR. BEARDSLEY: Just in brief, Your  
Honor. This suppression has to do with the  
State --- after the first indictment and  
prior to the second indictment, which is a  
2, 2 1/2 year period, the State and the  
co-defendant got together and the  
co-defendant was hired by the police and  
had a rendezvous with my defendant. There  
were also telephone taps made of the  
co-defendant's telephone, and there were at

least three different conversations that were wired. This is after the State had full knowledge that the defendant was represented by me, and he had been represented by me for two years. There had been a motion to sever while the State and the co-defendant were working together, and I believe that the State vehemently sought to have the cases still together, and at the same time were using that co-defendant against my

[19-A]

defendant in eliciting statements and taking --- making an interrogation which I feel deprived my defendant's right to counsel pursuant to the Sixth Amendment and the Maine Constitution.

THE COURT: That seems like a pretty narrow factual situation. Could you just practically stipulate---

MR. ANDERSON: I'm prepared to proceed on the suppression of any statements made.

\* \* \*

MR. ANDERSON: Gary Colson?

(The witness comes forward, takes the stand, and is duly sworn by the Clerk, J. Page)

[20]

GARY COLSON, called by the State, having been duly sworn, testified as follows:

--DIRECT EXAMINATION--

BY MR. ANDERSON:

Q Your name is Gary Colson; is that correct?

A Yes.

Q And you were charged with a series of crimes resulting from sort of a search and seizure incident back in, I believe it was January 16th of 1981?

A Yes.

Q You and Perley Moulton?

A Yes.

Q And as a result of that search and seizure and other evidence, you were charged with certain crimes flowing from that?

A Yes.

Q You were charged with the theft by receiving, I think at the time, of a four wheel drive pick-up?

A Yes.

Q And the theft of a dump truck?

A Yes.

Q The theft of some auto parts?

A Yes.

Q And you were also charged with, I believe, theft of a Mustang?

[21]

A Yes.

Q And Perley Moulton was charged along with you?

A Yes.

Q So, you were both co-defendants in exactly the same cases?

A Yes.

Q Now, at some point, having been charged with those crimes, did you ever go to talk to Bob Keating, Chief of Police in Belfast?

A Yes.

Q And do you remember when you did that?

A I believe it was November 4th.

Q Of what year?

A 1981.

Q Was it '81 or '82?

A '82.

Q So, quite a lot of time had transpired?

A Yes.

Q So, in November of last year you went to see Chief Keating?

A Yes.

Q How did you contact Mr. Keating?

A By phone, and we set up a meeting.

Q By phone you set up a meeting?

A Yes.

Q And where did you meet?

[22]

A Stockton Springs.

Q What was the purpose of your meeting with Mr. Keating in Stockton Springs?

A Well, I had been receiving threatening phone calls, and I just figured that that was enough, it had gone too far.

Q You met in Stockton?

A Yes.

Q And did you discuss much of anything with Mr. Keating in Stockton Springs on that day?

A No, I didn't.

Q What actually took place?

A He told me that I'd, you know, have to get my attorney to talk to him, that he just would not talk, you know, about the case, any of the crimes.

Q Okay. So, did you tell him anything about the offenses that you had been charged with at that time?

A No.

Q Did you tell him anything about what Perley Moulton had done that caused him to be charged with crimes at that time?

A No.

Q You did tell him that you were worried about the threats that were being made to you on the telephone?

A Yes.

Q And he advised you to talk with your lawyer?

[23]

A Yes.

Q And that was on November 4th. Was that a Thursday, to your recollection, or not?

A I'm not sure what day it was.

Q When did you meet with Chief Keating again?

A The 9th.

Q The 9th ---

A Of November.

Q Okay. A few days later?

A Yes.

Q And where did you meet with him?

A Phil Ingerni's office in Bangor, Maine.

Q And who is he?

A He's my attorney.

Q And did you have another meeting with Chief Keating?

A Yes, the 10th.

Q Where was that?

A That was in Orono at the Maine State Police barracks.

Q And is it true that in those two meetings the 9th and the 10th, you engaged in a protracted discussion or a questioning by Officer Keating and Rex Kelley of the Maine State Police concerning these criminal activities that you had been charged with?

A Yes.

Q And perhaps other criminal activities that you might have known about?

[24]

A Yes.

Q Now, in the interim between November 4th and November 9th and 10th, had you seen Perley Moulton?

A Yes.

Q And when did you see him?

A On the 6th.

Q Excuse me?

A On the 6th.

Q And where had you seen Perley Moulton?

A I met him at Don Marcia's house.

Q You met him at Don Marcia's house?

A Yes.

Q Where were you living at the time?

A In Northport.

Q And where was Mr. Moulton residing at the time?

A In New Hampshire.

Q And you met him at Don Marcia's residence. Was that in this area?

A In Belfast.

Q And what did you do after you saw him at Don Marcia's residence?

A We went to Rollie's in Belfast and then over to Jed's.

Q And did you discuss anything with Perley Moulton at Jed's?

A Yes.

Q And what was the nature of the discussions?

[25]

A Getting rid of a couple of the witnesses.

Q Who were these witnesses?

A Gary Elwell.

Q Was there anyone else besides Gary Elwell at this time?

A Basically Gary Elwell.

Q Was there any plan formulated?

A Well, sort of. I was going to Augusta down to the turnpike and pick up a car down there and then come back and take care of them.

Q Who was to give you the car down there?

A Perley.

Q Whose idea was this?

A Perley's.

Q And he told you this at Jed's?

A Yes.

Q And you had this discussion with Mr. Moulton at Jed's, and then it was just a couple of days later you were in Mr. Ingerni's office and you were talking with the police?

A Yes.

Q Did you tell them about this sort of threat?

A Yes.

Q You told who?

A Bob Keating and Detective Kelley.

Q You described this plan to them, did you not?

A Yes.

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Q Now, when you left Perley at Jed's or at the end of that night, was there any plan to meet again?

A He was going to call me.

Q He was going to call you?

A Yes.

Q Now, did he ever call you again after that meeting at Jed's?

A Yes.

Q He did. All right. And was that on November 22nd?

A It was the 21st.

Q November 21st?

A Yes.

Q How many times did he call you during this period?

A Well, I received three phone calls.

Q Now, was there anything placed on your phone to record these phone calls?

A Yes.

Q And who placed that device?

A Chief Keating and Detective Kelley.

Q And did they ask you whether you would allow it or not?

A Yes, they did.

Q And what did you tell them?

A I told them yes.

Q So, there was a listening device placed on your telephone?

A Yes.

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Q Now, when this listening device was placed on your telephone, did you receive any instructions as to how you were supposed to react if Perley Moulton called you?

A Just react normal, just be myself.

Q So, you got a call you said on November 21st?

A Yes.

Q Did you get any other calls?

A I got two other calls after that. I'm not sure of the dates.

Q Were they recorded?

A Yes.

Q After these calls were recorded, what happened to the tapes that they were recorded on?

A I give them to Chief Keating.

Q And these tapes that you gave to Chief Keating were telephone conversations between you and Mr. Moulton; is that right?

A Yes.

Q Who called who, or who called whom, I guess I should say, in order to establish these telephone conversations?

A Well, he called me twice, and then he had called and I wasn't home, and I was to call him back. And I called him back.

Q How did you know you were supposed to call him back?

A My wife told me. He give my wife the message.

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Q So, those were three tapes that you turned over to the police after you talked to Perley Moulton on the telephone?

A Yes.

Q Now, subsequently, a body wire was placed on you; is that correct?

A Yes.

Q In other words, another listening device was placed on your body?

A Yes.

Q By whom?

A Chief Keating and Detective Kelley.

Q When was this done?

A The 26th.

Q The 26th of?

A December.

Q The day after Christmas?

A Yes.

- Q And were you expecting to see Mr. Moulton that day?
- A Yes.
- Q And had you discussed when Mr. Moulton was to arrive where you were to meet each other at anytime?
- A Well, just that we was going to be together the 26th.
- Q And when was that decided, that you were going to be together on the 26th?
- A About a week before that.

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- Q And how was that decided?
- A Over the phone.
- Q Over the phone. So, it was established that you were going to have a meeting with Mr. Moulton at your --- was that at your trailer?
- A Yes.

- Q On the 26th?
- A Yes.
- Q And did Mr. Moulton arrive on the 26th?
- A Yes.
- Q And the officers were listening on this listening device?
- A Yes.
- Q And do they have a tape of that to your knowledge?
- A Yes.
- Q Now, with the exception of --- Did you have any other contact from the time of meeting at Jed's until December 26th, did you have any other contact whatsoever with Perley Moulton other than what you've testified to, the contact on the 26th, on the body wire, and the three telephone conversations, was there any other contact?
- A I don't believe so, no.

Q You didn't talk to him in any other regard?

A Just on the phone.

Q But as I'm saying, did you talk with him in any unrecorded conversations on the phone between those dates?

[30]

A No.

Q They were all recorded?

A Yes.

Q Now, after December 26th, did you speak with Mr. Moulton again prior to any Grand Jury proceeding?

A Yes.

Q And where did that take place?

A The Ground Round in Bangor.

Q And did you later tell Chief Keating what transpired at the Ground Round in Bangor?

A Yes.

Q And he wrote it down?

A Yes, I believe so.

Q But there was no recording of that meeting; is that correct?

A No, there wasn't.

Q Do you remember when that meeting took place?

A I'm not sure of the date, no.

Q How did you become aware that you were going to be meeting with Mr. Moulton on that day?

A A phone call.

Q A phone call?

A Yes.

Q At your home?

A Yes.

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Q From Mr. Moulton?

A Yes.

Q Who was where? Do you know where he was at the time?

A I believe at Don Marcia's house.

Q Don Marcia's residence?

A Yes.

Q What did Mr. Moulton say on the phone at that time?

A Just that we, you know, that we ought to talk and, you know, go out somewheres.

Q And following his --- did he call you, or did you call him?

A He called me.

Q He called you and said "we ought to talk and go out somewhere", and that's when you went to the Ground Round?

A Yes.

MR. ANDERSON: Your Honor, I have no further questions of this witness.

I would just say at this point that the evidence that the State has that could possibly be subject to suppression in this hearing consists of tapes of those three telephone conversations that Mr. Colson testified about, a tape from the body wire, and Mr. Keating's notes concerning this meeting at the Ground Round which took place. I have transcriptions of those that could offer as exhibits to the Court because I think the content of

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those is very important in order to decide the issues that the Court would be facing today.

THE COURT: Well, that's exactly what I was going to suggest. I don't particularly want to know what the contents are except that if I understand this witness correctly, the purpose of the original meeting with the Police Chief only indirectly had anything to do with the offenses that he was charged with, but more because he was receiving threats, and that was what precipitated it.

Now, do any of the conversations that he had over the telephone or by this listening device he had on his person, or his last conversation that he had with the defendant, did that have anything at all to do with the charges that ---

MR. ANDERSON: Yes, there's a lot of information, particularly on the final tape body wire; there's a lot of information damaging to the defendant during that

period of time. There was discussion as to their planned defense for the charges that they were facing. So, there is that type of information on it.

THE COURT: All right. That's all I wanted to know. Okay. And I would assume that for that reason we don't have to go into the contents of that because I assume that defense counsel has, or if it doesn't have, will have the opportunity to listen to the tapes.

[33]

THE COURT: Have you had an opportunity to listen to the tapes?

MR. BEARDSLEY: Yes, I have.

THE COURT: Okay; fine.

MR. ANDERSON: Just one comment. I think that the tape, or at least the transcript should be looked at in order to

--- The issue today is going to be whether information concerning crimes that Mr. Moulton already had been indicted on had been elicited by Mr. Colson -- I mean, I think that that is the issue without getting into argument at this point, and in order to determine that, the circumstances surrounding the tapes as well as the actual transcriptions themselves are very relevant to that.

MR. BEARDSLEY: The body tape especially.

THE COURT: Okay.

--CROSS-EXAMINATION--

BY MR. BEARDSLEY:

Q Gary, when you started to talk with Officer Keating, the case was a good two years old; isn't that right?

A Yes, it is.

Q And you had been through a number of hearings regarding this matter?

A Yes.

Q And you had been through a number of lawyers yourself; isn't that right?

[34]

A Yes.

Q And you knew that I represented Perley?

A Yes.

Q And had been representing him in the past couple of years?

A Yes.

Q And was representing him right through until today?

A Yes.

Q You knew that personally?

A Yes.

Q You didn't have to be told that by the Police Chief or anything else?

A No.

Q They knew that I had been representing Perley too, didn't they?

A Yes.

Q In fact, my name came up in some of your conversations about "Beardsley sent me this, told me that", or something like that in some of these conversations that were taped?

A Yes.

Q So, there's no question that everybody knew that Perley had a lawyer?

A Yes.

Q Isn't that correct, everybody knew that Perley was represented by a lawyer?

A Yes.

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Q Now, by any chance in any of these phone calls that were taped, you didn't tell Perley that you were taping him, did you?

A No.

Q And the body tape, you never said that you were taping him?

A No.

Q You didn't tell him that he had a right to have a lawyer with him when he talked with you obviously ---

MR. ANDERSON: Your Honor, the State agrees that these precautions were not taken, and that Mr. Moulton ---

THE COURT: I think the tapes eventually will speak for themselves anyway.

Q Now, was it your idea about these tape recordings, or did the police suggest it might be a good way of getting evidence against Perley?

A Well, the reason the tape recording --- the bug was put on the phone was to receive the threatening phone calls to see if they could find out who it was.

Q Okay. Now, did you tape every conversation that came in on the phone, every phone call that came into your house?

A Yes, I had turned it on on every one that came in, but if it was someone I knew, I turned it back off.

Q And I take it then that you only taped the conversations of Perley Moulton; is that correct?

A Yes.

[36]

Q And Perley never threatened you in those conversations, did he?

A No.

Q But you taped them anyway?

A Yes.

Q And it was your purpose though --- Now, these threatening phone calls, you know Perley's voice when you hear it, I mean, you were good friends?

A Yes.

Q And you recognize his voice when he calls?

A Yes.

Q And on those three phone calls, I take it you knew it was Perley because you recognized his voice?

A Yes.

Q And you've already testified that he didn't threaten you in any of those calls?

A No.

Q Now, I take it that you could not identify the person who made the threatening calls to you?

A No.

Q And did the police suggest also that it would be a good idea not only to tape the threatening phone calls but to tape Perley's calls too?

A Yes.

Q So, you went along with their suggestions on taping

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Perley's calls?

A Yes.

Q Even though you did not recognize his voice as the person that was threatening you?

A Right.

Q Now, regarding the body tape, whose suggestion was that?

A The Police Department's.

Q And did Officer Keating and Rex indicate how it could be worked and everything to you?

A Yes.

Q Did you immediately indicate that you would go along with this?

A Yes.

Q And I take it that this also was for the purpose to find out if threats were going to be made to you, or was this just to tape Perley?

A No, it was to find out the status.

Q It wasn't to tape Perley?

A It was also to find out if there was anything else that they was going to do to the Elwells or anybody else.

Q Up to this point, Perley had't made any threats to you personally?

A Not to me, no.

Q And that's what your main concern was when you went to the police; is that correct?

[38]

A Yes, sir.

Q So, when they put the body wire on you, it was not pertaining to the threats specifically against you, it was relating to the Elwells and the other things that you were talking about?

A Well, that and plus my safety.

Q Okay, I didn't understand. I thought that you just said that Perley hadn't threatened you up to this point?

A He hadn't.

Q He hasn't yet, has he?

A No.

Q It was just for your safety in case he did make a threat?

A In case something happened, yes.

Q And you've known Perley a long time?

A Quite a while.

Q And you didn't expect anything to happen, did you?

A No.

Q And you're saying that they told you just to carry on normal conversations?

A Yes.

Q And they suggested that if something was brought up relating to the break or to the Elwells or anything like that, to talk about it with Perley?

A Yes.

Q And didn't you inquire of Perley as to how he was going

[39]

to carry out these threats?

A No.

Q You didn't make any inquiry at all?

A No, everything was brought up perhaps first before we discussed it.

Q Well, how about the part where Perley said --- when Perley brought up the thing from the "SOLDIER OF FORTUNE" magazine about hauling out darts, putting in poison, things like that?

A Hm-hmm.

Q Didn't he initially say it would be stupid to carry out a threat because it wouldn't work, and you said "well, how would you do it anyway"? Is that possible that you said something like that?

A I don't remember exactly what I said.

Q Okay. It's possible then you may have asked him some questions about how he was going to carry out certain threats?

A After we probably got into the conversation, yes.

Q Now, you indicated that you got into the killing of the Elwells. You were the one that was supposed to do it; is that right?

A That was one way, yes.

Q And you're saying that you didn't carry on any conversation regarding that at all or that Perley did all the

[40]

talking?

A No, I just talked --- when we got into the conversation, I talked.

Q Would you say it was fairly along in the conversation and you talked about other things too?

A We talked about a lot of things.

Q Okay. And nothing had anything to do with these threats against you, I take it?

A No.

Q You never even told Perley that you had threats against you, did you?

A No.

Q You indicated that you taped all the other phone calls that came in when they initially started. Did you answer and talk a few lines?

A I tried to find out who it was and then I would turn the recorder off, but the recorder was on every time I picked up the phone.

Q So, those initial conversations that you had with everybody over that three or four week period, at least the first few lines should have been recorded; is that right?

A Yes.

Q And did you ever talk to Don Marcia during that time?

THE COURT: What's that go to do with this motion? It's immaterial who he talked to and what they

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discussed. Let's stick to this particular motion.

BY MR. BEARDSLEY: (continuing)

Q You indicated that the only contact you had with Perley during that time were the three phone conversations and when you went up --- with the body wire and you went up to the Ground Round; is that right?

A I believe so, yes.

Q Didn't you have any other contact by mail or by telephone?

THE COURT: What's that got to do with this motion? We are determining whether or not the use of the wire is illegal so that any conversation that transpired between them is suppressable.

MR. BEARDSLEY: All right. May I have just a moment? --(Pause)--

Q Now, was this your tape recorder or the Police Department's?

A The Police Department's.

Q And did they show you how to operate it?

A Yes, they did.

Q And did they give you a little instruction, a demonstration, example of how to do it on other telephones?

A No.

Q How about the body wire? Had you tried that before the actual incident?

A Just that morning.

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Q And they put it right on you?

A Yes.

Q And you tried it out to see how it worked?

A Yes.

Q And did you try it out with anybody else, or were you just waiting for Perley to use it on him?

A Just for Perley.

Q Okay. And Perley didn't have any knowledge that you had the wire on you, I take it?

A No, I don't believe so.

Q And the Police were outside your trailer or across the street?

A Yes.

Q Now, were you told anything as to how to approach Perley on the wire, on the body wire?

A Just to be myself.

Q Did they ask you to discuss the threats that were made against you?

A No.

Q How far away were the police from you when this body wire was going on?

THE COURT: What difference does it make?

MR. BEARDSLEY: Well, I want to know if they were in the building or if they were --- I mean, were you close enough so that if you were threatened they could

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jump right there?

A Yes.

Q I mean, they weren't inside your building?

A No.

Q They were within a couple of hundred yards?

A Yes.

Q Now, when this initially came up, now you indicated that they wanted you to talk to your lawyer before you spoke with the Police; is that correct?

A Yes.

Q And I take it your lawyer had some discussions with the Police too?

A Yes, I imagine.

Q And I take it that the discussions had something to do with your lawyer's concern with whether or not you were going to be charged with more crimes?

THE COURT: That is completely immaterial. It has nothing to do with this Motion to-Suppress.

MR. BEARDSLEY: Well, I think it does.

THE COURT: Well, I understand what you're going to say. I told you before that we're not going to use this as a pre-trial discovery process, that the issue here is relatively narrow. Let's stay within the narrow confines of this motion.

[44]

BY MR. BEARDSLEY: (continuing)

Q When you initially went to the Police they wouldn't talk to you; is that correct?

A That's right.

Q They only talked to you after you spoke to your lawyer?

A After I had spoken to my lawyer first.

Q After you had spoken to your lawyer?

A Yes.

Q And I take it your lawyer spoke with them too?

A He set up a meeting.

Q So, there was a meeting between all of you first?

A Yes.

Q And the meeting also had to do with you giving statements as to what happened in all these breaks and everything; is that correct?

A Yes.

Q Not just the threats, but all these charges that you were ---

A Everything.

Q Everything. And then they came out with cooperating with them regarding the telephone calls?

A Yes, they asked me to tape the phone calls, yes.

Q Okay. That was after you had given your statements relating to all these other charges?

A Yes.

Q And also the body tape too?

[45]

A Yes.

Q Okay. And that came after your initial complaint just regarding some telephone threat made by an anonymous phone call?

A Yes.

Q And it was clear that the police wanted Perley's statement either by the phone or by the wire tap, and they thought they could get it through you; is that correct?

MR. ANDERSON: I object to the qualifications of this witness to answer that question.

THE COURT: Well, I think that --- I am somewhat also concerned with the purposes of the use of this equipment, whether it

was for one reason or for another reason. I'd like to have this man --- I'm sure he may indicate to the Court what he understood the purpose of the taped telephone calls and also the body device. I'd like to have him indicate to the Court what he understood the purpose to be. Can (addressing witness) you tell me what that purpose was?

THE WITNESS: Number 1 was my safety.

THE COURT: Okay. What's number 2?

THE WITNESS: Number 2 was to --- for any other plans to do away with any of the witnesses.

THE COURT: Okay. And was there a number 3?

THE WITNESS: No.

[46]

THE COURT: Okay.

BY MR. BEARDSLEY: (continuing)

Q Now, you indicated that a lot of these phone calls had nothing to do with doing away with witnesses at all ---

THE COURT: The telephone calls, obviously you have copies of them, the Court will have them; they speak for themselves. Let's not go through those calls, the contents of those telephone calls.

MR. BEARDSLEY: If I could have just a minute, Your Honor. --(Pause)--

Q Did the Police ever indicate their concern to you that Perley was represented by a lawyer during all this time?

A I don't know if I understand what you mean.

Q They all knew that I represented him; is that correct?

A Yes.

MR. BEARDSLEY: I have nothing further at this time.

MR. ANDERSON: I have nothing, Your Honor.

THE COURT: You may step down, sir.  
(Whereupon the witness was excused)

+++++

MR. ANDERSON: Robert Keating?

(The witness comes forward, takes the stand, and is duly sworn by the Clerk, Joyce Page)

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ROBERT KEATING, called by the State, having been duly sworn, testified as follows:

--DIRECT EXAMINATION--

BY MR. ANDERSON:

Q Your name is Robert Keating and you're the Chief of the Belfast Police Department?

A Yes, sir, that's correct.

Q And in that capacity did you have --- were you the investigating officer, so to speak, or one of the investigating officers concerning several thefts that turned up as a result of a search at the former Belfast Dodge on Route 137 in Belfast, Maine?

A Yes, I was.

Q And in that capacity what did you do? Did you interview people and just conduct an investigation?

A Yes, sir.

Q Now, at any point did you receive a phone call from Gary Colson?

A Yes, sir, I did.

Q Now, you knew Gary Colson to be a person who had been indicated [sic] on these offenses, didn't you?

A That's correct.

Q And you knew that Perley Moulton had been indicted as well?

A Yes, that's correct.

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Q And you knew that they were --- you could term them as co-defendants?

A Yes, sir.

Q In one particular type of criminal incident?

A Yes, sir.

Q Now, that incident had not been resolved by trial or anything, it was a pending criminal investigation as far as you knew?

A Yes, sir.

Q And there was going to be a trial at some point, or something was going to happen?

A Yes, sir.

Q Now, when did you talk to Gary Colson?

A November 4th of 1982 was when I received information that Gary Colson wanted me to call him.

Q So, what happened?

A I was on routine patrol, I stopped at my residence to use the telephone, and I called Gary Colson.

Q And what happened during that conversation with Gary Colson back then?

A Gary indicated to me on the phone that he would like to talk to me, please set up a meeting for he and I to meet that afternoon on November 4th, and we did in fact meet in Stockton Springs.

Q And what transpired at that meeting in Stockton Springs?

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A Gary told me at that time that he had received threats over the telephone, the most recent one was the night before -- this was on Thursday, November 4th, he said he had gotten one on Wednesday -- telling him to keep his mouth shut or he could wind up dead, threats along that line.

Q Now, did you discuss anything else with Gary?

A We discussed his situation in general. I told him because he had exercised his right to remain silent that I would not discuss any crimes that he was indicted for, or under indictment for, until he had talked to his attorney, and I could talk in generalities with him, but I would not talk with him about any crimes he was under indictment for.

- Q So, you gained no information concerning crimes that he or Perley Moulton had been indicted for at that time?
- A No, I did not.
- Q Isn't it true though that on November 9th and November 10th at Phil Ingerni's office in Bangor and later at the Orono Maine State Police barracks, you did learn about these crimes from Gary Colson?
- A That's correct, on November 9th at attorney Phillip Ingenri's office, and on November 10th at the Orono State Police barracks.
- Q So, you had discussions about the incidents that he had been charged with?

[50]

- A Yes, the incidents that he had been charged with; the conversation that he had with Perley Moulton on November 6th, we discussed at that time.
- Q What did he say about any discussion he had with Perley Moulton on November 6th?
- A He told us, and I believe it was on November 10th at the Orono State Police barracks, that on November 6th Perley Moulton had suggested a plan to him on how to eliminate one of the potential witnesses, a Gary Elwell, who lived in Northport, and in fact, Perley had gone into a discussion on how that could be achieved.
- Q And did you know that this Gary Elwell was going to be a witness in the case, a potential witness in the case?

A Yes, I did. I had questioned Gary Elwell once before formally, and once informally about the case.

Q So, it was on November 10th that you learned of this; is that right?

A That's correct.

Q What happened after that, after November 10th?

A We had several discussions and meetings with you, Detective Kelley and myself. We obtained a taping device to attach to a telephone, and on November 12th I provided Gary Elwell --- I'm sorry, Gary Colson, with that recording device to be installed on his phone.

Q Now, why did you want this recording device installed on Gary Colson's phone?

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A I really had two reasons at that point -- (1) it had been left by Perley Moulton that he was going to call Gary back when some of the plans had been finalized to eliminate Gary Elwell, one of our witnesses, and also the fact that Gary Colson had been receiving some threatening phone calls.

Q So, you placed the recording device on the phone?

A That's correct.

Q Did you have any discussions with Gary Colson as to how he was supposed to act if Perley Moulton were to call?

A Yes, I did.

Q And what was the nature of those discussions?

A I told him that I wanted him to just act normal; I told him that I did not

want him questioning Perley Moulton and trying to engage Perley into a conversation, but that if Perley called up and started to talk to him about any elimination of witnesses or anything, that he could discuss it with him, but I did not want him specifically asking questions or trying to get Perley to talk about it.

Q Okay. And in fact, three telephone calls were received that were recorded and handed over to you; is that right?

A In fact, there were a total of four, but only three went onto the recording. On one occasion the recording device did not work properly.

Q And how did you learn that?

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A Each time that Gary received an incoming call and a conversation with Perley, he would let me know. He let me know about a phone call which I believe was New Year's Eve. He gave me a tape, and when I brought the tape back to my office, I played it to listen to the conversation and I found it to be blank.

Q So, you have no evidence of that discussion at all; is that correct?

A No, I do not.

Q And that was what, New Year's Eve?

A I'm pretty sure it was. I'd have to check my notes to be positive, but I'm sure it was a conversation on New Year's Eve in which Perley had contacted Gary about their meeting on New Year's Day I believe.

Q Now, do you know in fact whether these three tapes, or these three telephone conversations have been transcribed?

A Yes, they have.

Q And have you gone over them?

A Yes, I have.

Q And have you compared them to the tapes as you listened to the tapes?

A Yes, I have.

Q And isn't it true that sometimes it might be difficult to understand exactly what was said in certain places?

A Yes, it is. Sometimes there would be background noise

[53]

or laughter, or this type, and it would be hard to understand exactly what was said.

Q You've gone over the transcripts and related them to the tapes and acknowledging that there are problems in some places. Do you feel that these transcripts reflect what was on the tapes with the exception of things that were inaudible?

A Yes, I do.

Q And I guess I'll show you --- (Pause) I'm just going to show you a copy of each of these three telephone conversations, and ask you whether or not it is a transcript of the telephone conversation on a particular date that you received from --- it's from a tape that you received from Gary Colson. Would you examine these stapled pages that I'm showing you -- they'll be marked State's Exhibit #1. You don't have to read everything there, but have you seen that before?

A Yes, I have.

Q And what is that?

A This is a transcription of the first tape that I received which is a telephone recording of a conversation between Perley Moulton and Gary Colson which I received on November 22nd.

Q To your knowledge, is that the first one you received?

A Yes, it is.

[54]

Q Drawing your attention to what will be marked State's Exhibit #2, do you recognize what that is?

A Yes, this is a transcription of a tape recording via telephone of a conversation between Gary Elwell --- I'm sorry, Gary Colson and Perley Moulton given to me on December 2nd.

Q I notice that these say "revised" on them, or "reviewed" on them. What does that mean?

A It indicates that I have reviewed them. There are some pencilled in corrections where I listened to the tape, running and reading the transcription along with it.

Q Drawing your attention to what is marked State's Exhibit #3, can you identify what that is?

A This is a copy of a telephone conversation between Perley Moulton and Gary Colson which was on December 14, 1982.

Q And there are pencilled in corrections in parts of this. Do you know who is responsible for those?

A Yes, this is my writing, the pencilled in there, and I think there are several

places through there where I have pencilled in some corrections.

Q Someone else did the original transcript, you reviewed it, made a few corrections; is that what happened?

A That's correct.

Q Now, these are the three transcripts of the three tape recorded telephone conversations; is that correct?

[55]

A That's correct.

Q Now, at what point was it decided that this body wire might be appropriate, this so called body wire?

A Between the last phone recording that we had and Christmas Day, we learned that Perley Moulton was going to come to Belfast and wanted to meet with Gary Colson; in fact, he wanted to spend the

entire day with him the day after Christmas. It was between that period that we decided to put a body transmitter on Gary Colson.

Q Okay. And why was this body transmitter placed on him?

A For two reasons -- number (1) in my mind was his safety. At that point, he had received some threats; we did not know from whom those threats were coming; the risk that Perley might have realized that now Gary was cooperating with the Police, and (2) to see if we could hear and record any conversations about doing away with witnesses in the case or tampering with witnesses, trying to put pressure on witnesses, and for any other conversations that they might have.

Q Now, you have reviewed these three telephone conversations, have you?

A Yes, I have.

Q And was it in your mind, or were you aware of the possibility or probability that perhaps certain facets of the cases or the cases for which Perley Moulton was already

[56]

under indictment, were you aware that that might be discussed as well?

A Yes, I was.

Q You were aware of that?

A I was aware that they would probably talk about everything and anything. I really had no control over what they were going to talk about, but yes, I think I was aware of that.

Q But that didn't change your mind in having this body wire placed on Mr. Colson?

A No. I again had instructed, as had Detective Kelley instructed Gary Colson, not to attempt to question Perley Moulton, just be himself in his conversation, that he could agree or disagree with anything that he said, but I felt that I had an obligation in the course of my investigation to number (1) protect Gary Colson, and protect any other potential witnesses, and learn about any threats to eliminate witnesses or police officers in this case.

Q Now, you've testified that Gary Colson told you that he had been receiving anonymous telephone threats?

A That's correct.

Q And you've also testified that he told you that Perley Moulton devised a plan whereby he and Gary would perhaps kill Gary Elwell?

[57]

A Yes, he had told me about that conversation that had taken place on November 6th.

Q At Jed's?

A And then I learned again of one comment in one of the phone tapes where Perley made mention of that he had come up with a method, and I believed in my mind that that method was a way to eliminate somebody.

Q Now, had any other witnesses in the case ever given you any belief whatsoever, or caused you to believe that they too had been experiencing any

threatening gestures or threatening comments from anyone?

A Yes, I did.

Q Do you remember any names of witnesses who told you that they had been having problems in that regard?

A I had been told by Leslie Ducaster, also known as "Duke Ducaster", that he had been threatened on one occasion by Perley Moulton, and I believe that Don Marcia ---

Q Isn't that in fact discussed in this body wire taped phone conversation?

A Yes. I had also been told by a young man named Herman Peasley, who worked for Don Marcia, that he had been told on one occasion that a cup of acid could be thrown in his face, for those people who talked to police. And I had been told after, I believe it was

November 11th, by Gary Elwell that he too had received one threatening

[58]

phone call.

Q I'm showing you a folder which is marked State's Exhibit #4, and in it are pages marked --- numbered 1 through 122. Can you identify what that is?

A Yes. Without reading each page, that's a transcript of the body transmitter, the tape recordings that we received on December 26, 1982 when Gary Colson had a body transmitter on him, and we were recording the conversations between he and Perley Moulton.

Q And have you reviewed this before?

A Yes, I have.

Q And do you vouch that it has the same accuracy as the other three telephone

taped transcriptions that you looked at?

A Yes, I do.

Q Acknowledging that there are some inaudible or confusing sections?

A Yes.

Q Now, would you describe a little bit about how this, the mechanics of using the body wire on this particular day?

THE COURT: What difference does that make?

MR. ANDERSON: I just want to establish where he was in relation to the trailer.

THE COURT: Well, I don't think that's important; evidently the defense attorney thought it was important,

[59]

you may inquire as to where they were in relation to one another.

BY MR. ANDERSON: (continuing)

Q Basically what does Gary Colson live in?

A Gary Colson lives in a mobile home on the Beech Hill Road in Northport. There are about four mobile homes in that and one mutual driveway. It's a small trailer park.

Q And this conversation took place there; is that right?

A Yes, in Gary Colson's trailer.

Q And where were you located?

A We were across the road from the trailer park, I would say maybe 150 yards from Gary Colson's trailer behind a sand pile which is owned by the town of Northport.

Q You and ---

A Detective Rexford Kelley of the Maine State Police.

MR. ANDERSON: Your Honor, I have no further questions. I guess at this point I

would say that for the purposes of this hearing I'm offering these exhibits for your perusal and for your examination. If you would prefer to listen to the tapes themselves, they are available.

THE COURT: You're going to have to convince me why the contents of that is material to me at all. I think that what was said is completely immaterial. What were the reasons that this was set up, of course, is

[60]

important to this Court. But if you can convince me that it's important that I read them, I'll do the best I can.

MR. ANDERSON: My only comment on that is that in order to determine the reason for the tapes, it is probably worthwhile to

at least get the tenor of the tapes to see whether it is obvious that this was a direct attempt to go out and elicit information from Perley Moulton about crimes that he had already been indicted for or whether it was not for that purpose.

THE COURT: Okay.

--CROSS-EXAMINATION--

BY MR. BEARDSLEY:

Q It is true, Officer Keating, that there is nothing in those phone conversations directly relating to any crime, is there?

A Directly relating to any crime?

THE COURT: I don't understand your question.

Q Well, I want to try to get the reason for the body tape sometime later on. Are you saying that threats --- I think I have a right to inquire ---

THE COURT: I think you may question him, but not to interpret the conversations that took place. You may question him concerning the tape itself, but what the tape said should speak for itself I should imagine.

[61]

MR. BEARDSLEY: Okay; fine.

BY MR. BEARDSLEY: (continuing)

Q Officer Keating, how many threats had Gary Colson received?

A He told me that he had received, I believe, a total of four, the last one being on November 3rd, the day before he contacted me.

Q And were they men or women making these threats?

A They were male voices he told me.

Q Were they the same male voice or different?

A I believe he told me, as I remember it, that he thought it was the same male caller each time.

Q And did he give you the exact dates of these calls?

A No, other than --- the only one that I can recall specifically was the one he told me he had received the day before which would have been November 3rd of '82.

Q And because these threats were made to him, you didn't see fit to put it in any police reports; is that correct?

A I didn't see fit --- I don't understand. It's in my report that was filed with the District Attorney, and I believe it was provided to you in discovery.

Q Relating that there were four calls by a male voice?

A No, I'm talking about the threat on November 3rd, the conversation that he and I had on November 4th.

Q There were no threats in the phone conversations by

[62]

Perley Moulton to Gary Colson; is that correct?

A Not to Gary Colson, no.

Q And I take it that you had told Gary that if Perley called to tape the whole conversation?

A I had told Gary Colson that if he received any calls, and it was a threatening phone call that he was to record it. I also told him if Perley Moulton called that he was to record that in its entirety.

Q Regardless of what the phone conversation was about?

A That's correct.

Q Now, you indicated that there was --- that Gary Elwell had a threatening phone call?

A Gary Elwell told us that on November the 11th that he had received one threatening phone call.

Q Did you provide him with a phone tap?

A No, I did not.

Q How about Ducaster?

A No, I did not. He did not tell me that he had been threatened by phone; he told me he had been threatened in person.

Q Okay. Gary Elwell was the only other one that had been threatened by phone?

A That's correct.

Q And you did not see fit to protect him?

THE COURT: Once again, you're starting to get

[63]

beyond the scope of your motion.

MR. BEARDSLEY: Excuse me, Your Honor.

I'll try to get back on track.

BY MR. BEARDSLEY: (continuing)

Q You indicated the purpose was to prevent further threats against Gary Colson?

A That's correct. The purpose you're talking about of the phone ---

Q The tap.

A Yes, and also the purpose to see if there was any finalized plan on eliminating witnesses. On November 11th we cautioned Gary Elwell that his life might be in danger, and that the

---

Q You didn't post a police officer at Gary Colson's house?

A No, sir, I did not.

Q Did you give any instructions to his wife?

THE COURT: That's totally immaterial. Let's stay within the scope of this motion as to whether or not there was a legal process in setting up the tape recording. What he said to his wife is completely immaterial.

BY MR. BEARDSLEY: (continuing)

Q Were there any signal words that you gave to Gary Colson when the body wire was on him, in case his life was threatened that he was to give in case, you know, Perley was ---

[64]

A Any signal words, no, sir, there were not.

Q Did you tell him to tape every phone conversation that came in until he could tell whether or not it was threatening?

A That's correct. I told him to be prepared so that when he answered the phone, if there was a threatening phone call that he could turn the machine on and record it, and that he should be prepared and have it right next to the phone.

Q Did you give any explanation of why only the phone conversations of Perley Moulton should be recorded and not if anybody else called?

A Because I believe if it was his mother calling, for an example, that he wouldn't record it.

Q But he said that he did though, he said that he recorded every phone conversation that came in until he could determine who it was.

A I believe he turned the machine on and started to shut it off immediately as soon as he realized who the caller was and that it was not a threat or it was not Perley.

Q You admit though that there are no other phone conversations on those tapes other than Perley Moulton calling?

A That's correct.

Q There's nothing else, no picking up of another person saying "Hello, how are you"?

[65]

A No, there is not.

Q Did Gary Colson say that the threats against others like Gary Elwell were also made over the phone by Perley Moulton prior to starting taping?

A Did Gary Colson tell me what?

Q In other words, Gary Colson came to your office initially?

A On November 4th we met in Stockton Springs, not in my office.

Q He said "I've received threats; I've also talked with Perley and he has been threatening other people"?

A On November 4th?

Q Well, before you started taping phone conversations.

A Before I started taping any phone conversations, I was aware of a plan to eliminate witnesses ---

Q Gary Elwell?

A That's right, Gary Elwell. I was aware that Gary Colson was being threatened, and I was aware that Gary Elwell had received at least one threat.

Q And you received this information from Gary Colson?

A Gary Colson and Gary Elwell.

Q Did Gary Colson tell you that ---

THE COURT: You're again going outside of the scope. I will allow you to get a little discovery, but not total discovery in this proceeding. I'm sure you can get that information from the State.

[66]

MR. BEARDSLEY: I have nothing further of this witness.

MR. ANDERSON: Nor do I. There has been discussion of another non-taped conversation at the Ground Round, and I

would offer that --I don't have a copy of it right now -- and add it to this. It would come under the same standard because it would be conversation by Perley Moulton to Gary Colson after indictment, after counsel had been retained and all that.

MR. BEARDSLEY: I would certainly ask that those statements be suppressed. Those aren't the result of any tape recording or anything. It's just Gary Colson ---

MR. ANDERSON: I realize that.

MR. BEARDSLEY: -- relating what took place and his recollection of what Perley said and they just typed it up.

MR. ANDERSON: That's just like any other statements of the defendant. It's not recorded, but it's the same theory.

THE COURT: Now, what is your position? I don't understand what your position is.

Whatever took place at --- what is it, the Ground Round they call it?

MR. ANDERSON: Yes.

THE COURT: As between this defendant and the

[67]

witness Colson, I assume that that's Colson's version?

MR. ANDERSON: Yes.

THE COURT: And is your position that his testimony if he should take the witness stand and testify as to that conversation is suppressable?

MR. BEARDSLEY: No, he's trying to introduce the ---

THE COURT: Well, that's what I say. I don't think that that's material at all in this particular instance.

MR. ANDERSON: Well, it is a statement, and conceivably, according to their theory, it's made to a police agent at least, and therefore, may be suppressed. The fact that it's a statement written by a police officer rather than recorded is irrelevant.

MR. BEARDSLEY: I would agree with him in that any statements made by my client are suppressable in that instance because

---

THE COURT: Because why?

MR. BEARDSLEY: Gary Colson didn't identify himself as a police agent; he entered into a conversation with the specific intent of getting statements out of Perley Moulton, and there was no advice that he had a right to seek counsel. So, I would ask that those statements be suppressed as well, definitely.

[68]

THE COURT: Okay, I understand. So, you're going to admit them --- I mean, as being the conversation -- whether I suppress them or not --- you're just putting them in as an exhibit.

MR. ANDERSON: Yes, the fifth exhibit, Your Honor.

THE COURT: Yes, okay.

You may step down, sir.

(Whereupon the witness was excused)

+ + + + +

I would like to ask one question though if I may. Was this defendant, Moulton, charged with conspiracy to ---

MR. ANDERSON: No, he has not been charged with any conspiracy or solicitation as a result of any of these conversations.

THE COURT: Okay.

\* \* \*

TRANSCRIPT OF RECORDED  
TELEPHONE CONVERSATION  
BETWEEN PERLEY MOULTON,  
JR., AND GARY COLSON ON  
DECEMBER 14, 1982 AT  
9:30 P.M.

P. = Perley Moulton, Jr.

G. = Gary Colson

[20]

\* \* \*

P. Yeah, yeah. I I talked to a few people.

G. Yeah.

P. But ah, he's gonna get back to me on it. And ah, well I I gotta talk to you when I get up there, anyway. So you know, Sunday, are you gonna be available Sunday? So I can talk to you? That Sunday after Christmas?

G. Yeah.

P. Cuz I want to be, I want to get together with you the entire day and ah and go for it. You know what I mean? Yeah, just want to ah, review the whole plan.

G. Ok.

P. You know, I'd like to get together.

G. Yeah, I want to talk to you about what you said earlier too. You had something in the works there.

P. Yeah.

G. Ok?

P. Oh yeah.

G. Yeah, alright, we can talk Sunday anyway.

P. Yeah, that's coming up next week, yeah. Next Sunday.

G. Week after....

P. The 26th.

G. Right, that's the week after, this....

P. Right.

G. This Sunday, right?

P. Right.

G. A week from this Sunday coming?

P. Right, day after Christmas.

G. Yeah, ok.

P. And ah, I don't know, gotta get together with some people. Shut our mouths off and stuff, see what's happening.

G. Ok, Yeah, I think that's a good idea cuz we're gonna have to get some

P. We've gotta get our shh, we've gotta get our shit together Gary and ah and ah, there's no ah, we can't frig around anymore.

[21]

G. Yeah.

P. Gotta know what's doing down.

G. Yeah. I sure do.

P. And I'm telling you, you gotta keep running it through your mind after we go through it. You want to run it through your mind.

G. You got the whole report don't you?

P. I got everything.

G. Yeah, ok. See, I don't have everything.

P. Ok, well I'll bring it up with me.

\* \* \*

TRANSCRIPT OF BODY-WIRED  
MEETING BETWEEN PERLEY  
MOULTON, JR., AND GARY  
COLSON ON DECEMBER 26,  
1982

P. = Perley Moulton, Jr.

G. = Gary Colson

(The following portions of the Transcript were admitted as State's Exhibit #25 at Mr. Moulton's trial.)

[16]

\* \* \*

G. That was the worst fucking night of my life. I don't know. I don't know its a toss up between the Mustang and the pick up. Which one didn't have the heater in it?

P. The pick up probably.

G. I think it was the pick up. Didn't have remember?

- P. I don't remember. If it had a heater or not. I don't remember. I remember it going down the road.
- G. You know.  
(Laughing)
- G. It plowed pretty good.
- P. Yes, it did, a little light in the back.  
(Laughing) (Inaudible)
- P. Had to throw chains out. Amway.

\* \* \*

[23]

\* \* \*

- G. Oh boy, I just hope I can make it through this. Good, cuz I want you to help me with some dates. One date I cannot remember Caps, just can't remember, I know it was in December, what night did we break into Lothrop Ford? What date?

- P. The 12th.
- G. Of December.
- P. I think so, I don't know though, I'm not sure, I think it was the 12th.  
(Laughing)
- P. Because all that stuff stayed out in the truck, remember?
- G. How many times did we drill them fucking locks, humh?
- G. Well, we tried 3 doors.
- P. Let me see, we tried 3 doors  
(Inaudible)....then eventually we tried kicking the door in, then we gave up, somebody else must have broke in.  
(Laughing)
- G. I wish, I kind of wish that happened now.
- P. I don't regret it mother fucker.
- P. I really don't.
- G. You know something.

[24]

P. I enjoyed it myself.

(Laughing)

G. Oh shit, remember, remember when we took the pick up out through there and we, and we dumped all the stuff off it, that truck out back. Then I drove it back and then we, then I dumped it into whatever pond it was out there.

P. Sanborn's Pond.

G. Sanborn's Pond right.

(The following parts of this page and page 25 were not admitted at Mr. Moulton's trial.)

G. What's the discovery?

P. Lets see its the end of Ducasters report.

G. Oh Jesus, that come out good.

P. Thats the only good one there is really.

G. There not gonna help our chances in court at all. I have written to the District Attorney for better copies, but these are the best I can do for now.  
(Laughing)

O.K., anyway see what do I do?

P. I did, I went through all my bullshit for trials and all the transcripts and reports and shit and I picked out the ones with the dates. Donald Martin, a mustang, that mustang was stolen  
(Inaudible).

G. Ah, thats a vehicle report wasn't it?

P. On 12-13-80, December 12, ah December 13, 1980, that mustang was stolen.

G. Then we couldn't have broken into Lothrop Ford the 12th.

P. Yeah, I knew some 12th was some dates.

G. There's no way we could have then, this is after, right?

[25]

P. Yeah.

G. Wasn't Lothrop Ford our first biggy? 12-13-80, you remember what day that was?

P. Yep.

G. You can?

P. The night we went to Phillips, Maine, to look at a Mustang.

G. And, ahh my ex-wifey will ahh will ahh----

P. Testify for ya probably.

P. (Inaudible) lie for you?

G. Yeah, she will.

\* \* \*

(The following portions of the Transcript were admitted as State's Exhibit #26 at Mr. Moulton's trial.)

[33]

\* \* \*

P. Um, look at this I, I like this. I read this fucking section and it blew my mind. Ah, received a call from Rex Kelley and found there were some potatoes had been dumped along side the road. No evidence. No further evidence was found in the area. In Waldo.

P. You can't remember? (Inaudible)

G. In Waldo?

P. You don't remember....the.... truck went up there and dumped a load in the middle of the road.

G. I do now, laughing, too bad we couldn't have emptied it thought whew!

[34]

P. I know it.

G. Hunh?

P. I know it stunks.

P. Still ah...

G. Still half a truck load of God Damn potatoes when we got it to the garage Caps.

P. What was we supposed to take the time to get up there with a shovel?

(Laughing)

And knock it loose.

G. (Inaudible)..did you follow me, yah, you followed me up there, or did you, no. Yah, you did. O.K.

P. Just in case... (Inaudible)

G. I couldn't remember.

P. I should have, should have left it right there with the potatoes.

\* \* \*

[35]

\* \* \*

P. One thing I got to come up with is a bill of sale.

G. Bill of sale for what?

P. Ford parts.

G. You got one?

P. Oh, yeah spares.

G. Well you haven't got one.

P. Unh-Unh.

P. Where did all the spare Ford parts come from stored in the spare room then I said, I said I bought them from a Cliff Stueben from Brooks. Can you give me a description of him?

P. Yeah, he's about 5 (Inaudible) beard.

P. How much did you pay for them?

\$150

Didn't you think something was funny when he only wanted material?

No, he told me he was going out of business and he wanted to sell these things in (Inaudible) and he told me he'd give me a good deal.

G. Five foot what?

G. Five foot nine, dark hair and beard.

G. Now you done something, something?

P. I, I did that so I'd remember who it was so I, I you know.

Clifton Larrabee? Shirley's nephew?

[36]

G. Yeah.

P. I made it up of him so I'd remember it. (Laughing)

P. When he got off the stand he'll say (Inaudible) have you ever seen that mother fucker before? Has he seen you since? Yah, I seen him since. I'll say I seen him with Shirley Larrabee. Him cruising him and Shirley Larrabee cruising around.

P. So if you want some information from Cliff Stueben, ask Shirley Larrabee.

\* \* \*

[41]

(The following part of this page was not admitted at Mr. Moulton's trial.)

P. Well thats what Beardsley told me, he says that all we ought, he told me to be prepared to go to jail.

G. Thats nice of him.

P. Yeah, well he told me, he says be prepared, he says be prepared. Prepare for your worst, but then hope for the best. That's why Beardsley always tells me. And I told him, I said, well what happens, what happens. There aint nothing I can do about it. All I can do is just, all we can do is work our ass off and see if we can defend ourselves any better. Cuz right now, theres, cuz theres (Inaudible)

(The remainder of page 41 was admitted at Mr. Moulton's trial as part of State's Exhibit #26.)

G. O.K. there's another thing now we still don't know what date Lothrop Ford was broken into. O.K., we stole the Mustang on the 13th of December and we stole the dump truck on the 13th of January.

P. That date....

G. They're exactly a month apart, how about that?

P. So probably, Lothrop Ford was the 13th of November.

G. Oh shh- what do you think killed us on this?

P. Dump truck.

G. Thought about it and though about it and thought about it.

P. Definitely the dump truck. Yeah, we shit in your own back yard. We got money hungry, well we was hurting for money.

G. Yeah, we was, was hurting for money bad.

G. Remember, I couldn't come up with fucking rent money for that trailer down there?

What I should have done was stay working at the school department.

(The following portions of the Transcript were admitted as State's Exhibit #27 at Mr. Moulton's trial.)

[72]

P. I don't know, it was quite late though, that night that we stole the dump truck.

G. I mean ahh, the pick up truck.

P. I don't remember what fucking time it was (Inaudible).

G. I'll tell you something, I'll tell you why. It doesn't make no difference if its thrown out. O.K., that don't make no difference but I remember we rode for hours.....

P. Looking for one.

G. Looking for one. Remember?

And you know another thing that bothered me? Was some guy we recognized Don's truck? No, we didn't recognize Don's truck.

G. He gave some kind of description of it?

P. Yeah, yeah the Ford or some fucking thing?

G. He did say the color didn't he? Didn't he say it was black and tan, or tan and black or something? Remember he got nervous it, and we told Don to scrape that frigging road runner off that Cap?

P. Yeah.

G. Or take the cap off or something?

P. Yeah, I remember because some guy was standing right out there.

\* \* \*

[75]

\* \* \*

G. Just like Richard Rumney, and his tire tracks.

P. Well, it worked.

G. Hah?

P. It worked (Laughing)

G. Yeah, but you aint gonna tell me that son of a bitch followed them tracks up the God Damn road, Caps.

P. Well, I'll tell you something, that other guy he... he's full of shit.

G. Up the tar road.

P. He's full of shit also, because I went over there and there and erased

[76]

those fucking tracks going into that fucking bay, I got pictures of it. I took, remember when Cathy and I went over there and took pictures going into that bay. Not a fucking tire track that went into that fucking bay.

G. He says there was.

P. He says there was.

G. I remember you took pictures of the front of that door.

P. Yeah, like Cathy held.

G. I remember the snow was up against it.

P. Yeah.

G. February 17th.

G. Is that the date on pictures?

P. I had to sign these and Cathy help the sign and the date and every fucking thing.

G. I do remember that.

Ah yes, I do remember most of it.

\* \* \*

[89]

\* \* \*

P. Well, I, I want to drill this into our fucking heads.

P. Let me just scratch through this thing.

G. Ask me some questions Caps?

P. (Inaudible)

G. You don't mind if I stand up for a minute do you?

Jesus! what time is it anyways?

P. O.K., the green Ford Mustang here in the back bay, behind the pick up truck.

G. Mm-mm

P. How long was the fucker sitting in that back bay?

G. Sigh, Jees, that, thats been sitting there for...

P. Since the end of December up near the, sitting there, been there ever since, where was he supposed to put it?

G. Yeah, that's not why.

P. So it's been sitting there ever since, since we took the garage over. I wonder if its been in there ever since we took the garage over? Since we pushed it in there.

[90]

G. Well, I think it actually was though.

P. It was?

I think we actually pushed it in with the pick up truck with the 4 wheel drive.

(Sigh)

P. Didn't we?

G. Yeah, we did.

P. I think so. Anyway, you say it says, it says right here Keating, when I was....

G. No, Fowler pushed that in for us didn't he?

P. Maybe he did with a bulldozer.

G. I think Fowler pushed it in. I'm almost, I'd almost bet on it. That don't make no difference. I'll just say its been sitting there  
(Noise)

P. This is the statement where you....

G. It's there then?

P. Some of it, just the end of it. Also he further stated that Perley Moulton did not have anything to do with the rear bays at the, at the structure. He said that he never goes out there and doesn't, doesn't know anything about the 4 wheel drive pick up.

Well the pick up doesn't matter anyway.

P. This is your interview down in the police station.

G. That's thrown out.

P. ....green Mustang had parked out there. He said that he didn't know anything about, about all of the Ford parts and accessories that were (Inaudible). He said that Perley Moulton had them. He said that he came to work one morning and the

[91]

box of gaskets were just sitting there. He said that he thought Perley Moulton had gotten them. He said that I'm hardly ever out there and I have never see the stuff before. (Inaudible)

G. Boy, I'm denying everything.

(Noise in background) (Spoon stirring in cup)

P. See ya got, I could see where you got all fucked up in the first interview.

G. Yeah, so don't I.

P. You didn't know what to say, what to lie about, what to not lie...

G. Well, we, we hAdn't discussed nothing.

\* \* \*

[97]

\* \* \*

G. What time did we arrive home?

P. It was just before 11 I believe, oh  
what was I gonna write?

G. What time did we break in that night?  
Must have been early.

P. It was early. It was like 8:30 or 9:00.  
It was early.

G. I think it was before that, I think it  
was 8:00.

F. Yeah, as soon as it got dark. It got  
dark early those days.

G. Yeah, Jesus Christ Caps, gets dark at  
4:30 or 5:00.

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P. And they close, what time to they  
close? They close at 6 usually or 7.  
Yeah, so it gonna be around 8, 8

o'clock. Wanted to make sure everybody  
was out of the building.

G. Now, now, I'm gonna ask you another  
question, O.K.?

How many holes did you drill, sir?

P. Too many! (Laughing) God Damn it.

That was well executed plan though,  
wasn't it? I was proud of that.

G. It was.

P. Very well executed...

P. (Inaudible) Even the Bangor Daily News  
said it was a well executed plan.

G. It was professional.

P. Them people knew what they was doing,  
and knew what they wanted.

G. It's it's too bad we couldn't prove  
that we didn't steal no tires that  
night.

P. (Inaudible)

G. Because we didn't steal any tires that night.

\* \* \*

(The following portion of the Transcript was not admitted at Mr. Moulton's trial.)

[8]

P. Yah, he thought something was wrong becuz the door locks were out of it.

G. And we told him we was gonna paint it. That was our answer. Yup. ah. Did you see him in the police office before into It says in here you did.

P. Yunh, I know.

G. And he told you he was in there because of a speeding ticket or something.

P. I never seen him in there. I don't even know what, don't even know what you're talking about seeing him in

there. I figure he put that in there to make it sound good.

G. Yah, I know, O.K., yup the white one, it that came in during the night.

\* \* \*

(The remainder of page 8 and the following portions of the Transcript were admitted at Mr. Moulton's trial as State's Exhibit #28.)

[8]

\* \* \*

P. I have got an idea mother fucker.

P. Thats the only problem, its so touch and go. This is gonna have to be somebody we can trust, and ah, but I don't know of too many people we can trust. Since we're not going to have Linda coming up for Houston.

P. We need somebody, see I want to, I want to turn this thing right around and pin it on Elwell, and David.

G. All of it?

P. Yup? but, the dump truck.

P. The whole fucking dump truck.

G. You notice how I, I, can I say something about that?

P. Sure.

G. I'm sorry to interrupt Caps.

G. They both say, now I read it wrong, cuz Elwell, Gary and David both say that I said I was gonna burn it.

P. Yeah, I know.

P. Now they're after you. I mean Elwell's testimony went right after you.

G. I can't believe it though.

P. All they said about me in the whole fucking thing was that I went down

[9]

town and blew some windows out and shit.

G. Yeah, Okay right here.

G. Blew some windows out and shit, O.K. right here.

G. Yah, you know, even if they ratted on us O.K., well.

P. Yah.

G. They ratted on us, but they didn't have to, they didn't have to tell the God Damn cops that you know, you went out shooting windows out. That's stupid thou, Caps!

P. (Inaudible)

G. What's that got to do with it?

P. I know, but you..... they jewelry store, he threw the jewelry store in.

P. Is there a reason David threw the jewelry store in because when we go to trial...

G. Is it hard for you to talk on the phone?

P. Oh, in the morning it is, well I don't dare to talk too much on the phone.

G. That's what I'm saying tho....

P. Oh, yah.

G. Cuz you know I notice.

P. I try to.

P. I don't want to directly connect myself to anything, just, in case they're listening.

G. Yah.

P. Becuz chances are they're listening becuz they want to build a big case.

G. How are they gonna tap the line outside, is that, can they do that?

[10]

P. Oh, yah.

G. Ayeah, but isn't that against the law? Isn't it against the law?

P. Yeah, it is against the law. They could never use it in court against us, unless they got a court warrant to tap,

ah to tap the lines which they can.

They can get a, a, court approved.

G. Yeah, but we'd have to know about that tho, right?

P. No.

G. No?

P. Mm-mm but I think possibly they could tap our lines with no problems.

G. Especially where it's a private line, then?

P. Yeah.

Also if, if there's arson involved its a federal case. No, it's, it's a federal-----a federal----do hicky.

G. Tell me about it buddy, tell me about it.

P. (Laughing).

G. Look who's name is on that son of a bitch.

- P. Yea, Yeah, but we're going to get around it.
- G. Look, look it says I don't remember exactly what he said, but Gary Colson is running scared.
- I know he said I ought to torch it or something like that.
- P. Who, who suggested that you ought to fucking touch it?
- G. I, I did.
- P. Did Elwell suggest it?

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- G. I did. But Gary thought it was a good idea.
- P. Yeah, O.K.
- G. I said it.
- P. Who, who went over to, who bought the gasoline? Over at Mullen's?
- G. I did.

- P. Oh.
- G. I did.
- P. Did Elwell give you the money?
- G. Nope.
- P. Did he supply the jug or something?
- The jug, where did you get the jug from?
- G. Out of the back of his truck. You wait a minute here, there's something else I wanted to.... You knew the truck was burned, yes, ever exist, assist them in any way? Only thing I done was Gary Colson come up to me while at McDonalds.....blah, blah, blah Take me out to Don Marcias and drop me off, right.
- G. But you get in here a little ways further, have you, did you, have you read this good.
- P. I've read it, yeah.

G. All right everything he never said nothing about burning the truck. When I saw the flames I said, "what the fuck did you do?" The flames were up over the trees, up over the tops of the trees. He never said nothing he was white as a ghost. He just said get me to Don Marcias. (Laughing)  
(Snickering)

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P. He doesn't say you burned the truck though. He can't actually prove you actually burned that truck.  
P. You never said you did.  
P. You never said you, I burned the truck.  
G. Right. There's another part in here. Alright questions. Did you know he was going to burn the truck. Answer, He said he was going to, I didn't know he

would. I didn't think he had the berries.

P. Mm-mm (Laughing)  
G. Will you take a polygraph examination as to what you have told us? Yes, I will take it. Gary Elwell and all that bull shit.  
P. He takes a polygraph, that fucking thing is going to go beeeep, because he lies so and he's gone around so much stuff.  
G. You know this will, there's one thing here too like he said he turned around when he picked me up and went back up 137 towards Belfast, O.K. thats when he saw the flames start. We never went that way. We went right across in back of Bowens Store across down thru City Point, Head of the Tide and down that way.

- G. We never, Jesus Christ, We never went back up thru there.
- P. He doesn't even remember. He's forgetting alot of the stuff.
- G. He's, he's forgetting.
- P. And when he gets the fucking stand.
- G. Thats what I said tho, he's forgetting.
- P. That's rite, when hes forgetting and when he gets on the fucking stand he's gonna fuck up, cuz, he's gonna have to, he's gonna have to say gee

[13]

he don't know what happened. He gonna have to make up what happened.

- P. (Inaudible)-----and my original idea Gary.
- P. Is we're going to turn this around and make it look like they burnt the truck and stole the truck, but what are we going to do with the fucking witness?

Only witness I can think of that may help hus, but I don't know is Peter Weser.

Peter Weser thinks we're innocent.

- G. Yeah, but there's another thing about that Caps. You ask him to do something like that and he wouldn't, but Weser's such a chicken shit. I think he'd crack under pressure.
- P. You think so?
- G. Yes, sir. I do. It don't take nothing to scare the boy.
- P. Yeah.
- G. You get him up there in front to the D.A. and the D.A. is gonna tear him apart. Perley, you know it.
- P. That's the only one I can think of.
- G. No, its true tho, right?
- P. Well probably I,-----
- G. Well see my point, tho.

- P. I don't know him that well, I know he's, I know he's ah (Inaudible)
- G. He's not a very strong person I'll tell ya.
- P. Well, I's thinking.
- G. He aint like you and I see.
- P. If we can get a witness to say-----he was driving around.

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- We gotta find some one that drives around, goes around McDonalds once in a while.
- G. Mm-mm
- P. That night he see, you and I, Gary Elwell and David walking out of McDonalds around 10:30 and ah we got in our car and Elwell got in his. Elwell and I, Elwell and ah you and I was going across the bridge, he happened to

- be going over to Mullen's ah, this witness, to pick up a beer or something or get some gas and we turned off onto Mill Lane and Elwell went straight to Mullen's and bought a little gallon of gas, thats all he'd have to say.
- G. Yah, but how in the hell are they gonna remember?
- They aint gonna remember 2 years ago?
- Don't even know who the Christ was there (Inaudible)
- P. The reason he's gonna remember is because right after this happened, Beardsley told us to get us some alibis and we and we remember seeing this guy, following us home. So, so you know we talked to him next week. (Inaudible)
- You said I haven't lived in a mobile home for a long time forgot what it felt like to live in a mobile home.
- (Laughing)

G. Tell me about it, rocks you to sleep at nite or frigging wind though, rocks you to sleep. I'm gonna be honest with you, I'm scared about this. You know. You don't have to worry about nothing, don't you know, don't think that I

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don't mean it like that I'm just, I'm just worried that's all. I think I got every fucking right to be, you know.

P. But, we got to turn it around some how Gary.

G. Yah, I know.

P. Because this right here will convict us.

G. Yes, it this will, right here.

P. This will.

G. See the thing is Caps, even how this reads you're still an accessory to it.

P. Oh, yeah.

G. To the arson.

P. I'm an accessory, yeah and we're gonna get convicted on it course we are.

G. No, right, well you know what I'm saying? Tho?

P. Yeah, I'm still involved.

G. Ah - I don't know boy, I tell ya, this is crazy.

\* \* \*

ITEMS OMITTED IN PRINTING

The decision of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., Decision No. 3584, Law Docket No. Wal-83-401 (Decided August 16, 1984), and the opinion and order of the Maine Superior Court (Date of entry: June 20, 1983) have been omitted in printing this appendix because they appear, beginning on the following pages, in the appendix to the printed Petition for a Writ of Certiorari:

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(4)  
No. 84-786

Office-Supreme Court, U.S.  
FILED

MAY 10 1985

ALEXANDER L. STEVAS,  
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE,  
Petitioner

V.

PERLEY MOULTON, JR.,  
Respondent

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

BRIEF FOR PETITIONER

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70 PM

QUESTION PRESENTED

Whether the Sixth Amendment right to counsel is violated under Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), where, in the course of a good faith investigation of crimes for which a defendant has not yet been charged, the police unintentionally obtain in the absence of counsel the defendant's incriminating statements about crimes for which he has already been charged?

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#### OPINIONS BELOW

The citation to the opinion of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr. is State v. Moulton, 481 A.2d 155 (Me. 1984). This opinion is also reproduced in the appendix of the State of Maine's printed Petition for a Writ of Certiorari at pages 1 through 42.

The Maine Superior Court order finding no violation of Mr. Moulton's Sixth Amendment right to counsel is reproduced in the appendix of the printed petition at pages 43 through 49.

#### JURISDICTION

Petitioner invokes the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. § 1257(3).

The opinion and judgment of the Supreme Judicial Court of Maine in State v. Moulton, 481 A.2d 155 (Me. 1984), was entered on August 16, 1984, and the Court's mandate issued the same day. The sixty-day period provided in U.S. Sup. Ct. Rule 20.1 for filing a certiorari petition would have ended on October 15, 1984. Pursuant to Rule 20.1, Mr. Justice Brennan, by order dated October 11, 1984, extended the State's time for filing its petition for certiorari by 30 days to and including November 14, 1984. The State of Maine's Petition for a Writ of Certiorari was timely filed on November 13, 1984.

CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On April 7, 1981, a Waldo County grand jury indicted Perley Moulton, Jr., and his friend Gary Colson on three felony counts of theft by receiving two stolen trucks and stolen auto parts and also a misdemeanor count of theft by receiving a stolen automobile. J.A. 8-12, 23-25, 51.

On November 4, 1982, Colson contacted the police to complain that he had been receiving threatening telephone calls. J.A. 25-26; State v. Moulton, 481 A.2d 155, 159 (Me. 1984); Pet. App. 9-10, 43-44. The police would not discuss with Colson any of the crimes committed by Moulton and Colson because Colson did not have a lawyer with him. J.A. 27-28, 72-74. No agreements were made nor any relationship established between the police and Colson at this time. J.A. 27-28, 73-74.

Two days later on November 6th, Moulton met with Colson to reveal his (Moulton's) plans to kill Gary Elwell, a State's witness in the criminal case against Moulton and Colson. J.A. 30-32; Moulton, 481 A.2d at 159; Pet. App. 10, 44-45.

Moulton told Colson that he would telephone Colson later to finalize plans for the murder. J.A. 33, 77.

On November 9 and 10, 1982, Colson again met with the police to discuss the threats he had been receiving and Moulton's plan to kill Gary Elwell. J.A. 64-66, 75-76; Moulton, 481 A.2d at 159; Pet. App. 10, 45. Colson, with his lawyer present part of the time, also discussed the crimes for which he had been indicted and other crimes. J.A. 28-30, 64-66, 74-75; Pet. App. 45. The police agreed not to bring any additional charges against Colson in exchange for his testimony at Moulton's trial. (Transcript of Jury-Waived Trial, Vol. II, at 293-95; see J.A. 63-66).

The police received reports from other State's witnesses, including Gary Elwell, that they had been threatened either in-person by Perley Moulton or over the telephone. J.A. 89, 98; Moulton, 481 A.2d at 159; Pet. App. 10. On November 12, 1982, the police gave Colson a recording device for his telephone in order to 1) investigate the threatening telephone calls Colson said he had been receiving, and 2) learn more about Moulton's plans to kill Gary Elwell. J.A. 50, 52, 67, 76, 77, 87, 99; Moulton, 481 A.2d at 159; Pet. App. 10, 45.

Without any prompting by Colson, Moulton initiated three telephone calls to Colson, who recorded the conversations and

turned over the tapes to the police.<sup>1</sup> J.A. 33-36, 39-40; Moulton, 481 A.2d at 159; Pet. App. 10, 45-46. In the first telephone conversation on November 21, 1982, Moulton stated, without being prompted by Colson, that he (Moulton) had "come up with a method" for killing Gary Elwell and that he wanted to meet with Colson sometime around Christmas to discuss Moulton's plans. (Transcript of Recorded Telephone Conversation, dated November 22, 1982, at 4-5). At the end of this conversation Moulton stated that he would telephone Colson again in a few weeks. (Id. at 13).

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<sup>1</sup> The recordings of the three Moulton-Colson telephone conversations were not offered at trial. Moulton, 481 A.2d at 159 n.3; Pet. App. 10 n.3.

In the second telephone conversation on December 2, 1982, Moulton called to discuss the discovery materials Moulton had recently received from the State.

(Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 1-9). In the course of this conversation Moulton suggested that a defense at trial would be to blame two of the State's witnesses - viz., Gary and David Elwell - for the crimes charged to Moulton and Colson. (Id. at 5-6, 8). Near the end of the conversation Moulton affirmed that he would be coming to Colson's home around Christmastime so that they could review the discovery materials together and plan their defense. (Id. at 8).

In the third telephone conversation on December 14, 1982, Moulton, again without being prompted by Colson, discussed both the discovery materials and their defense. (Transcript of Recorded Telephone Conversation, dated December 14, 1982, at 1-5). Moulton stated that he wanted to meet with Colson "the entire day" on December 26th at Colson's home in order to review thoroughly their trial strategy, including the testimony each of them would present. J.A. 109-12. Because of their previous discussions, Colson raised the subject of Moulton's plan to kill Gary Elwell. Moulton agreed to discuss that plan on December 26th also. J.A. 110.

Prior to this meeting, the police equipped Colson with a body wire

transmitter so that the police could listen to and record the conversation. The officers' reasons for the body wire were 1) to protect Colson in the event that Moulton already realized, or should learn in the meeting, that Colson had become a police informant, and 2) to learn more about Moulton's plans for killing and otherwise tampering with witnesses. J.A. 53-54, 67, 85, 87; Moulton, 481 A.2d at 160; Pet. App. 13, 46. The police instructed Colson "to act like himself, converse normally, and avoid trying to draw information out of Moulton," which were the same instructions given to Colson earlier when the recording device was placed on his telephone. Pet. App. 46; Moulton, 481 A.2d at 161; Pet. App. 16; J.A. 35, 55-56, 61-62, 77-78, 87.

Near the beginning of the December 26th meeting Moulton initiated conversation about their defense. (Transcript of Body-Wired Meeting, dated December 26, 1982, at 5). Shortly later Moulton stated that he had an idea for their defense and wanted "to turn this thing right around and pin it on [Gary] Elwell, and David [Elwell]." J.A. 137. Moulton then questioned Colson to learn if Colson's arson of a dump truck could be blamed entirely on Gary Elwell. J.A. 142-45. Moulton also discussed his plans for an alibi defense, which depended on finding a witness who would commit perjury. J.A. 146-51. Moulton made additional incriminating statements throughout the meeting in the course of reviewing the

discovery materials and planning the perjured testimony to be given at trial by himself and Colson. J.A. 113-36. Some of Moulton's statements were prompted by Colson (see, e.g., J.A. 113-16), and some were not (see, e.g., J.A. 121-23).

On April 13, 1983, Moulton filed in Maine Superior Court (Waldo County) a pre-trial motion to suppress his statements to Colson in the three telephone conversations and the December 26th meeting. The motion was expressly based on the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Me. Const. art. I, § 6. J.A. 16-19. At the suppression hearing, Respondent abandoned his Miranda-based Fifth Amendment challenge to the statements' admissibility, claiming

only that the statements were obtained in violation of Moulton's right to counsel under the Sixth Amendment and Me. Const. art. I, § 6. J.A. 22.

In an "Opinion and Order" filed June 20, 1983, the Suppression Hearing Justice denied Moulton's motion to suppress on the basis of Sixth Amendment law without ever discussing Me. Const. art. I, § 6. The Justice specifically found that Moulton's three telephone conversations and one "body wire" conversation with Colson

were recorded for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted. Testimony shows that the recordings were made in order to gather information concerning the anonymous threats that Mr. Colson had been receiving,

to protect Mr. Colson and  
to gather information  
concerning defendant  
Moulton's plans to kill  
Gary Elwell.

Pet. App. 48-49. Citing Massiah v. United States, 377 U.S. 201 (1964), and United States v. Henry, 447 U.S. 264 (1980), the Justice ruled that the police here did not "deliberately elicit" or "create a situation likely to induce" Moulton's post-indictment incriminating statements in the absence of counsel. Pet. App. 49.

Following his conviction<sup>2</sup> in a

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<sup>2</sup> Mr. Moulton was convicted of Class B and Class C theft (17-A Maine Revised Statutes Annotated (M.R.S.A.) § 353 (1983)) and Class C burglary (17-A M.R.S.A. § 401 (1983)). J.A. 4, 6. These crimes were charged in two indictments (Superior Court Docket Nos. CR-83-13 and CR-83-16) out of seven indictments returned by a Waldo County grand jury on January 21, 1983. J.A. 12-15. Since these seven indictments covered the incidents alleged in the original indictments dated April 7, 1981, as well as several new charges, the original indictments against Moulton were subsequently dismissed. J.A. 1-2.

jury-waived trial in which portions of the body wire recording were admitted into evidence (J.A. 113-16, 119-23, 124-36, 137-51), Respondent appealed to the Maine Supreme Judicial Court, alleging, inter alia, that the manner in which the police obtained his incriminating statements at the December 26th meeting violated the Sixth Amendment. On review, the Maine Supreme Judicial Court found ample evidence to support the finding below that the body wire recording was made "for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted." Moulton, 481 A.2d at 160; Pet. App. 12-13. However, the Maine Court also stated that because Moulton and Colson were friends and codefendants

the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded.

Id.; Pet. App. 15. Hence, the Court held that the police here violated Henry because

[w]hen the police recommended the use of the body wire to Colson they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson.

Id. at 161; Pet. App. 18.

#### SUMMARY OF ARGUMENT

Respondent Moulton's Sixth Amendment right to counsel was not violated because the police did not "deliberately elicit" his post-indictment incriminating

statements. There was no "elicitation" because Moulton himself created the situation inducing his incriminating statements. There was also no "deliberateness" because the police's relationship with Moulton's friend and codefendant Gary Colson was not established for the purpose of obtaining any evidence from Moulton about the crimes for which he was indicted. Because Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980), require both police elicitation and deliberateness in order for there to be a "critical stage" of the criminal prosecution necessitating the assistance of counsel, there was no Sixth Amendment violation here.

A. In every case in which the Court has found that a pretrial event constituted a "critical stage" under the Sixth Amendment, the government has created a confrontation with the accused, either as a stage in the judicial process or as part of an on-going investigation of the crime. In finding Sixth Amendment violations in Massiah, Brewer, and Henry, the Court has applied a test of "deliberate elicitation," which is shorthand for determining 1) whether a confrontation with the accused was created by the government, and if so, 2) whether the government-created confrontation was for the purpose of obtaining post-indictment incriminating statements.

B. Because the police neither created Moulton's incriminating situation nor

intended to obtain statements from him about his pending charges, there was no Sixth Amendment violation here. Moulton himself created the situation inducing his incriminating statements by initiating all of the contacts between himself and his friend and codefendant Gary Colson in order to obtain Colson's aid for Moulton's trial defense plans. In effect, the body wire that the police placed on Colson's person and the recording device placed on his telephone were no more than listening posts for incriminating statements Moulton would have inevitably made without regard to whether Colson ever contacted the police. Moreover, none of the police actions in this case - viz., the body wire, the telephone recording device, and an

agreement not to bring any additional charges against Colson in exchange for his testimony at Moulton's trial - was for the purpose of obtaining post-indictment incriminating statements from Moulton.

ARGUMENT

MR. MOULTON'S SIXTH AMENDMENT RIGHT TO COUNSEL DID NOT APPLY TO HIS MEETING WITH THE BODY-WIRED INFORMANT BECAUSE THE MEETING WAS NOT A GOVERNMENT-CREATED CONFRONTATION OF THE ACCUSED REQUIRING THE ASSISTANCE OF COUNSEL.

In this case Respondent Moulton on his own initiative repeatedly sought out his friend and codefendant Gary Colson for assistance in killing a State's witness and planning the presentation of their defense at trial. Without any prompting by Colson,

who had contacted the police and become an informant, Moulton initiated a meeting between the two of them for the purpose of completely reviewing their trial defense. To protect Colson and investigate Moulton's plans to kill and otherwise tamper with State's witnesses, the police placed a listening device on Colson prior to this meeting.

The Maine Supreme Judicial Court held that the police use of the body wire violated Moulton's Sixth Amendment right to counsel because the police knew or should have known that Moulton would make incriminating statements about the crimes for which he had been indicted in his meeting with Colson. State v. Moulton, 481 A.2d 155, 160-61 (Me. 1984); Pet. App.

15-18. By applying this broad "foreseeability" standard for determining whether Moulton's incriminating statements were "deliberately elicited" in violation of the Sixth Amendment, the Maine Court misapprehended the scope of the Sixth Amendment and the import of this Court's decisions in Massiah v. United States, 377 U.S. 201 (1964); Brewer v. Williams, 430 U.S. 387 (1977); and United States v. Henry, 447 U.S. 264 (1980). In contrast to those cases, there was no deliberate elicitation here both because Moulton himself created his incriminating situation and because the police did not use Colson for the purpose of obtaining Moulton's incriminating statements.

A. A "critical stage" of the prosecution exists for Sixth Amendment purposes only where the government creates the pretrial event in which the defendant incriminates himself and the event is created for the purpose of obtaining post-indictment incriminating statements.

The "core purpose" of the Sixth Amendment right to counsel is "to assure aid at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" United States v. Gouveia, 104 S.Ct. 2292, 2298 (1984) (quoting United States v. Ash, 413 U.S. 300, 309 (1973)). In extending the right to certain pretrial events deemed "critical stages" of the criminal prosecution, the Court has repeatedly emphasized the importance of two

factors. First, the government has created an encounter with the defendant so that "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," United States v. Ash, 413 U.S. at 310." Gouveia, 104 S.Ct. at 2298; see Ash, 413 U.S. at 311-12; United States v. Wade, 388 U.S. 218, 224-26 (1967). Second, "the results of the confrontation 'might well settle the accused's fate and reduce the trial itself to a mere formality.' United States v. Wade, supra, 388 U.S. at 224." Gouveia, 104 S.Ct. at 2298; see Ash, 413 U.S. at 309-13. Both factors have been present in every case in which the Court has found that a pretrial event constituted a

critical stage under the Sixth Amendment.<sup>3</sup>

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<sup>3</sup> For example, both factors were present in Wade, where the Court held that a government-created lineup, which produces potentially dispositive identification evidence, constitutes a trial-like confrontation of the accused requiring the presence of counsel. Wade, 388 U.S. at 228-36. In contrast, neither factor was present in Ash, where the Court held that a photographic display containing the defendant's picture is not a critical stage both because the accused himself is not present at the display and therefore cannot be confronted or "overpowered by his professional adversary" (Ash, 413 U.S. at 317) and because a photographic display, due to the ease with which it can be accurately reconstructed, can be cured of any defects or prejudice at the trial itself. Id. at 315-17, 318-20. Compare, e.g., Coleman v. Alabama, 399 U.S. 1 (1970) (preliminary hearing which determines whether the accused will be tried and could have consequences for his defense on the merits constitutes critical stage) with Gerstein v. Pugh, 420 U.S. 103, 122-25 (1975) (Fourth Amendment probable cause hearing addressed only to pretrial custody is not a critical stage because there are no serious consequences for the trial).

Critical stages fall into one of two categories - either 1) pretrial judicial proceedings where the accused is confronted by his adversary such as preliminary hearings (Coleman v. Alabama, 399 U.S. 1 (1970); White v. Maryland, 373 U.S. 59 (1963)) and arraignment (Hamilton v. Alabama, 368 U.S. 52 (1961)) or 2) investigative confrontations of the accused by prosecuting authorities such as line-ups (United States v. Wade, 388 U.S. 218 (1967)) and direct and surreptitious interrogations (Massiah; Beatty v. United States, 389 U.S. 45 (1967); Brewer; Henry). The Court has insisted on counsel for the defendant being present at these events in order to prevent the government from using these critical pretrial

confrontations, all of which the government has itself created, to frustrate the adversary process at the trial stage. In other words, the government is not allowed to undermine the adversary value of the accused's traditional right to the assistance of counsel at trial by generating pretrial events outside the presence of defense counsel where the government can obtain evidence from, or otherwise take advantage of, the uncounseled defendant and thereby "reduce the trial itself to a mere formality." Gouveia, 104 S.Ct. at 2298 (quoting United States v. Wade, 388 U.S. at 224). Cf. Coleman v. Alabama, 399 U.S. 1, 15-16 (1970) (Douglas, J., concurring) (in Russian criminal procedure issue of guilt

is resolved in pretrial interrogations "in the inner precincts of a prison" so that the trial concerns only the issue of punishment).

The Court's decisions in Massiah, Brewer, and Henry are firmly rooted in these Sixth Amendment principles. As the Massiah Court recognized, pretrial interrogation constitutes a critical stage of the prosecution because questioning of an uncounseled defendant by a law enforcement officer or his agent may deny the accused "effective representation by counsel at the only stage when legal aid and advice would help him." Massiah, 377 U.S. at 204 (quoting Spano v. New York, 360 U.S. 315, 326 (1959) (Douglas, J., concurring)). Massiah's "deliberately

elicited" standard is therefore shorthand for determining whether a pretrial event is in fact a police-created confrontation for the purpose of obtaining incriminating statements and thus a critical stage to which the right to counsel applies. See Kamisar, Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?, 67 Geo.L.J. 1, 41-55 (1978).

Viewed in the context of these Sixth Amendment principles, the "deliberately elicited" test consists of two distinct considerations. First, is there elicitation? That is, has the government itself created the situation inducing the defendant's incriminating statements? See Henry, 447 U.S. at 274-75. Second, if

there is elicitation, is it deliberate? That is, has it been done for the purpose of obtaining incriminating evidence? A Sixth Amendment violation occurs only when both parts of the test can be answered affirmatively.

The definition of the "elicitation" component of the "deliberately elicited" test - i.e., has the government created the situation that induces the defendant's incriminating statements - comports with the Sixth Amendment principle prohibiting the government from generating critical pretrial confrontations outside the presence of defense counsel. The definition thereby recognizes that a pretrial event in which the defendant incriminates himself is not a critical

stage of the prosecution unless the government itself creates the confrontation.

This point was acknowledged in both Brewer and Henry. In Brewer, no Sixth Amendment protection "would have come into play if there had been no interrogation," i.e., if Detective Leaming had not delivered his "Christian burial speech" which induced Williams to give incriminating information. Brewer, 430 U.S. at 400. Likewise, in Henry, the Court noted that an inanimate electronic listening device, which "has no capability of leading the conversation into any particular subject or prompting any particular replies" (see, e.g., United States v. Hearst, 563 F.2d 1331, 1347-48 (9th Cir. 1977), cert. denied, 435 U.S.

1000 (1978)), and a passive informant, who "makes no effort to stimulate conversations about the crime charged," may pose no Sixth Amendment problem. Henry, 447 U.S. at 271 n.9; see id. at 276-77 & n.\* (Powell, J., concurring), 301 (Rehnquist, J., dissenting). The reason is because a "listening post" alone, by its inability to induce statements from the accused, does not create an incriminating situation.

The definition of the "deliberate" component of the "deliberately elicited" test - i.e., is the government's elicitation for the purpose of obtaining post-indictment incriminating statements - also accords with Sixth Amendment principles. This definition protects the Sixth Amendment interest in preventing the

government from creating pretrial events designed to elicit statements and thereby undermine the adversary value of the right to counsel at trial. It recognizes that the Sixth Amendment's concern is with intentional and purposeful, not negligent, frustration of the adversary process. See Henry, 447 U.S. at 279-80 & n.3, 282 n.6 (Blackmun, J., dissenting). Massiah and its progeny are therefore "expressly designed to counter 'deliberat[e]' interference with an indicted suspect's right to counsel." Henry, 447 U.S. at 282 n.6 (Blackmun, J., dissenting). Indeed, "[t]he unifying theme of Massiah cases... is the presence of deliberate, designed, and purposeful tactics, that is, the agent's use of an investigatory tool with

the specific intent of extracting information in the absence of counsel." Id. at 280 (Blackmun, J., dissenting). By focusing on governmental intent, the "deliberate" component of Massiah's "deliberately elicited" test "imposes the exclusionary sanction [only] on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent." Id. at 282 n.6 (Blackmun, J., dissenting).<sup>4</sup>

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<sup>4</sup> In contrast, the Maine Court's objective "foreseeability" test for finding a Sixth Amendment violation - viz., "that the police knew, or should have known, that Moulton likely would make incriminating statements at the meeting that Colson recorded" (Moulton, 481 A.2d at 160, 161; Pet. App. 15, 18) - suggests that the definition of "deliberate elicitation" under Massiah is informed by the objective definition of "interrogation" used for Fifth Amendment-Miranda purposes contained

The Court found Sixth Amendment violations in Massiah, Brewer, and Henry because both parts of the "deliberately elicited" test were satisfied in each one of those cases. In each case the government created a pretrial confrontation

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in Rhode Island v. Innis, 446 U.S. 291, 301 (1980) ("the term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police... that the police should know are reasonably likely to elicit an incriminating response from the suspect"). However, this suggestion erroneously confuses the distinct policies underlying the Fifth and Sixth Amendments. Id. at 300 n.4. The Innis definition of interrogation "focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the Miranda safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." Id. at 301; see Henry, 447 U.S. at 282 n.6 (Blackmun, J., dissenting).

with the defendant for the purpose of obtaining incriminating statements. In Massiah, the law enforcement officer placed a radio transmitter in the automobile of Massiah's codefendant, who had become an informant. The officer instructed the informant to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the pending indictment. Equipped with a radio receiver, the officer was able to overhear the informant's entire conversation with Massiah. Massiah, 377 U.S. at 202-03; United States v. Massiah, 307 F.2d 62, 66 (2d Cir. 1962); Id. at 72 (Hays, J., dissenting); see also Henry, 447 U.S. at 279 (Blackmun, J., dissenting). By permitting the officer to monitor the

meeting, the listening device insured that the informant would follow the instructions to elicit post-indictment incriminating statements from Massiah. Henry, 447 U.S. at 279 n.2 (Blackmun, J., dissenting).

In Brewer, Detective Leaming denied permission for Williams' lawyer to accompany Williams in the police car on the ride from Davenport to Des Moines, Iowa. Having thereby isolated Williams from his lawyers and knowing Williams to be deeply religious and a former mental patient, Detective Leaming delivered the "Christian burial speech" for the conceded purpose of obtaining from Williams as much incriminating information as possible before he saw his lawyer again. Brewer, 430 U.S. at 391-93, 399 & n.6.

In Henry, the government had a contingent-fee arrangement with an informant, one of Henry's jailmates, who would be paid only if he produced useful information furnished by Henry. Henry, 447 U.S. at 270, 271 n.8. Although instructed not to question or initiate conversations with Henry regarding the pending charges, the informant was nevertheless free to discharge his responsibility, and earn his fee, "in myriad less direct ways" such as gaining Henry's confidence and participating in conversations in which Henry felt free and was subtly encouraged to discuss his past crime. Id. at 268, 271 & n.8, 274 & n.12. The likelihood of that result was significantly increased by the fact of Henry's incarceration. Id. at 273-74.

In all three of these cases, the government elicited the defendants' statements by creating the situations inducing the defendants to incriminate themselves. Moreover, in all three cases the elicitation was deliberate, i.e., for the purpose of obtaining incriminating evidence.<sup>5</sup> Hence, by engineering a critical pretrial confrontation with the accused outside the presence of defense

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<sup>5</sup> The Court found the Sixth Amendment to have been violated in Henry in precisely these terms, holding that "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel, the Government violated Henry's Sixth Amendment right to counsel." Henry, 447 U.S. at 275 (emphasis added). Although Petitioner has interpreted the term "deliberate elicitation" to involve a two-pronged test, in practice most cases involving government-created confrontation also involve the government acting deliberately within the meaning of this test.

counsel, the government in each case undermined the value of the right to counsel at trial and thereby violated the Sixth Amendment.

- B. Because the police neither elicited Moulton's post-indictment incriminating statements nor used the informant for the purpose of obtaining those statements, there was no violation of Moulton's Sixth Amendment right to counsel.

In contrast to Massiah, Brewer, and Henry, there was no Sixth Amendment violation - no deliberate elicitation - in this case. There was no elicitation in that the police did not create the situation in which Moulton incriminated himself at his meeting with the informant, Gary Colson, on December 26, 1982.

Moreover, there was an absence of deliberateness in that the police did not place the body wire on the informant, nor make any other arrangements with him, for the purpose of obtaining incriminating statements from Moulton about the pending charges.

In the instant case Moulton himself created the pretrial event inducing his incriminating statements. On November 6, 1982, prior to when Moulton's friend and codefendant Gary Colson became a police informant (J.A. 25, 27-28, 51, 73-74), Moulton met Colson to reveal his (Moulton's) plans to kill Gary Elwell, a State's witness in the criminal case against Moulton and Colson. J.A. 30-32; Moulton, 481 A.2d at 159; Pet. App. 10,

44-45. Moulton told Colson that he would telephone Colson later to finalize plans for the murder. J.A. 33, 77.

On November 21, 1982, Moulton telephoned Colson to say that he (Moulton) had "come up with a method" for killing Gary Elwell and that he wanted to meet with Colson sometime around Christmas to discuss Moulton's plans. (Transcript of Recorded Telephone Conversation, dated November 22, 1982, at 4-5). At the end of this conversaton Moulton stated that he would telephone Colson again in a few weeks. (Id. at 13).

On December 2, 1982, Moulton telephoned Colson to discuss the discovery materials Moulton had recently received from the State, which included statements given to

the police by three of the State's witnesses - Gary Elwell, David Elwell, and Leslie Ducaster. (Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 1-9). Moulton accused these witnesses of lying to the police in order "to cover up for themselves" (Id. at 2, 5), noted that the statements of Gary and David Elwell were inconsistent (Id. at 7), and suggested that a defense at trial would be to blame Gary and David Elwell for the crimes charged to Moulton and Colson. (Id. at 5-6, 8). Near the end of the conversation Moulton affirmed that he would be coming to Colson's home around Christmastime so that they could review the discovery materials together and plan their defense. (Id. at 8).

On December 14, 1982, Moulton telephoned Colson again and, since Colson was not home, left a message for Colson to call back. J.A. 36. When Colson called back, Moulton began to discuss the discovery materials and plan their defense. (Transcript of Recorded Telephone Conversation, dated December 14, 1982, at 1-5). Moulton stated that he would be coming to Belfast, Maine (the city in which Colson lives) on December 24th and would be leaving two days later on December 26th. (Id. at 7). Near the end of this conversation Moulton stated that he wanted to meet with Colson "the entire day" on December 26th in order to "review the whole plan." J.A. 109-10. Moulton told Colson:

[Moulton]. We've gotta get our  
shh, we've gotta get our shit

together Gary and ah and ah,  
there's no ah, we can't frig  
around anymore.

[Colson]. Yeah.

[Moulton]. Gotta know what's  
going down.

[Colson]. Yeah. I sure do.

[Moulton]. And I'm telling you,  
you gotta keep running it  
through your mind after we go  
through it. You want to run it  
through your mind.

[Colson]. You got the whole  
report don't you?

[Moulton]. I got everything.

[Colson]. Yeah, ok. See, I  
don't have everything.

[Moulton]. Ok, well I'll bring  
it up with me.

J.A. 111-12. Because of their previous  
discussions, Colson raised the subject of  
Moulton's plan to kill Gary Elwell.  
Moulton agreed to discuss that plan on

December 26th also.<sup>6</sup> J.A. 110.

Near the beginning of the December 26th meeting Moulton initiated conversation about their defense, stating: "So you think we're in deep sh-- huhh?"

(Transcript of Body-Wired Meeting, dated December 26, 1982, at 5). Shortly later Moulton stated that he had an idea for their defense and wanted "to turn this thing right around and pin it on [Gary] Elwell, and David [Elwell]." J.A. 137.

Moulton then questioned Colson to learn if Colson's arson of a dump truck could be blamed entirely on Gary Elwell. J.A.

142-45. Moulton also discussed his plans

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<sup>6</sup> The three telephone conversations on November 21, December 2, and December 14, 1982, were the only contact between Moulton and Colson between their November 6th and December 26th meetings. J.A. 39-40.

for an alibi defense, which depended on finding a witness who would commit perjury. J.A. 146-51. Moulton made additional incriminating statements throughout the meeting in the course of reviewing the discovery materials and planning the perjured testimony to be given at trial by himself and Colson. J.A. 113-36. Some of Moulton's statements were prompted by Colson (see, e.g., J.A. 113-16), and some were not (see, e.g., J.A. 121-23).

By virtue of the three telephone conversations and the November 6th meeting, Moulton himself set in motion and fostered the chain of events that made inevitable his incriminating statements at the December 26th meeting. Without any

prompting by Colson, Moulton originated two separate approaches to their defense - 1) the plan to kill a State's witness (J.A. 30-32; see Moulton, 481 A.2d at 159; Pet. App. 10, 44-45) and 2) a trial strategy that included the presentation of perjured testimony. (Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 5-6, 8; J.A. 109-12, 121-23, 137, 146-51). From the November 6th meeting onwards, Moulton on his own initiative consistently contacted Colson for assistance in accomplishing both of Moulton's plans. (See J.A. 33-36 and the transcripts of the three telephone conversations). In accord with this pattern of their relationship, Moulton initiated the December 26th meeting with

Colson and put on the agenda a complete discussion of their trial strategy.<sup>7</sup>

J.A. 109-12. Even though some of Moulton's statements at the meeting were prompted by Colson's questions and statements, Colson asked those questions and made those statements in the context of planning their trial strategy (see, e.g., J.A. 129-36, 137-51) - a situation created by Moulton. Under these circumstances Moulton himself,

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<sup>7</sup> The facts that Moulton arranged the November 6th meeting before Colson had become a police informant, and initiated each of the three telephone conversations in which the December 26th meeting was arranged without any prompting by Colson, are significant indicators that Moulton, not the police, created his self-incriminating situation. Cf. Henry, 447 U.S. at 272 n. 10 (issue of who initiated conversations between Henry and informant-jailmate was "irrelevant" in that case since the government, through its contingent-fee arrangement with the informant, had otherwise created a situation likely to induce Henry's incriminating statements).

not the police, created the pretrial event in which he incriminated himself outside the presence of defense counsel.<sup>8</sup>

Colson's relationship with the police does not negate this conclusion for two reasons. First, in contrast with Henry where the government contacted the informant as the first step in creating an incriminating situation (Henry, 447 U.S. at 266), here Colson sought out the police for

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<sup>8</sup> The Maine Court's determination that the police "intentionally created" Moulton's incriminating situation simply by placing the body wire on Colson (Moulton, 481 A.2d at 161; Pet. App. 18) takes a single act out of context and ignores the fact that Moulton at every turn created the situation in which he incriminated himself. The mere placement of a body wire cannot rise to the level of the government-created confrontation required by Massiah, Brewer, and Henry.

his own protection because he had been receiving threatening telephone calls. J.A. 25-26; Moulton, 481 A.2d at 159; Pet. App. 9-10, 43-44. In Colson's initial meeting with the police on November 4, 1982, the police discussed with him the threatening telephone calls but would not discuss any of the crimes committed by Moulton and Colson because Colson did not have a lawyer with him. J.A. 27-28, 72-74. Hence, when Colson met with Moulton two days later on November 6th - the meeting in which Moulton revealed his plans to kill Gary Elwell (J.A. 30-32; Moulton, 481 A.2d at 159; Pet. App. 10, 44-45) and set in motion the chain of events culminating in the December 26th meeting - Colson was not yet being used by the police for any purpose.

Second, the police instructed Colson "to act like himself, converse normally, and avoid trying to draw information out of Moulton" during the three telephone conversations and the December 26th meeting. Pet. App. 46; Moulton, 481 A.2d at 161; Pet. App. 16; J.A. 35, 55-56, 61-62, 77-78, 87. These instructions show that the police, instead of using Colson to elicit incriminating statements, were taking steps to comply with Massiah. Henry, 447 U.S. at 281 (Blackmun, J., dissenting) (quoting Wilson v. Henderson, 584 F.2d 1185, 1191 (2d Cir. 1978), cert. denied, 442 U.S. 945 (1979) (investigating officer's "directions, 'Don't ask questions; just keep your ears open,' suggest familiarity and attempted

compliance with, not circumvention of, the principle of Massiah"))).

By telling Colson to maintain his relationship with Moulton as if he had never become an informant, the police instructions also functioned to preserve Colson's cover and possibly his life. The police did not thereby, however, create Moulton's incriminating situation. In the face of Moulton's repeated efforts to involve Colson in his plans, the police were simply not interfering with Moulton's own initiative in arranging to incriminate himself. This point is supported by Weatherford v. Bursey, 429 U.S. 545, 557 (1977), where the Court held that an informant who is invited to a meeting with the defendant and the defendant's lawyer to

assist in preparation of the defendant's trial defense is not required by the Sixth Amendment to refuse to attend the meeting and thereby "unmask himself." Since unquestionably there would be no Sixth Amendment issue if Colson had first approached the police after December 26th, it should make no difference under the circumstances here - viz., Moulton's self-created incriminating situation - that Colson, for his own safety, contacted the police before rather than after the three telephone conversations and the December 26th meeting while otherwise maintaining his normal relationship with Moulton.<sup>9</sup> See Massiah, 377 U.S. at

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<sup>9</sup> The Maine Court's rule of "foreseeability" establishes a bright-line test that post-indictment statements obtained by an informant, even a passive

212 (White, J., dissenting) (as a matter of policy, "[n]either the ordinary citizen nor the confessed criminal should be discouraged from reporting what he knows to the authorities and from lending his aid to secure evidence of crime."); see also Henry, 447 U.S. at 297 (Rehnquist, J., dissenting).

It also makes no difference under the Sixth Amendment whether the police gave Colson any incentives to violate the police

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one, or indeed an electronic listening post, can never be used at trial since a defendant's statements to an informant, who by definition has some relationship to or knowledge of the defendant, are virtually always foreseeable. Because this rule stretches Sixth Amendment protection beyond anything sanctioned by this Court, viz., to cases like the present one where there is neither police elicitation nor deliberateness, the rule should be rejected.

instructions - viz., the body wire on Colson's person (Moulton, 481 A.2d at 159; Pet. App. 11), the recording device on his telephone (Id.; Pet. App. 10), and the agreement not to bring any additional charges against him in exchange for his testimony at Moulton's trial<sup>10</sup>

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<sup>10</sup> Since the purposes of the body wire, the recording device, and the agreement not to bring additional charges were unrelated to obtaining statements from Moulton about his pending charges (J.A. 50, 52, 53-54, 63-66, 67, 77, 85, 87, 99; Moulton, 481 A.2d at 160; Pet. App. 13, 45-46; Transcript of Jury-Waived Trial, Vol. II, at 293-95), these three police actions did not give Colson an incentive to prompt post-indictment incriminating statements from Moulton in violation of police instructions. Cf. Henry, 447 U.S. at 268, 271 & n.8, 274 & n.12 (purpose of government's contingent-fee arrangement with informant was to obtain post-indictment incriminating statements from Henry; therefore, although instructed not to question or initiate conversations with Henry about pending charges, informant was nevertheless provided incentive - viz., the contingent-fee arrangement - to elicit

(Transcript of Jury-Waived Trial, Vol. II, at 293-95; see J.A. 63-66). For even after Colson had become a police informant, it was still Moulton who, without any prompting by Colson, consistently sought out Colson in order to plan and thoroughly discuss their defense at trial. Moulton thereby created the situation inducing his incriminating statements at the December 26th meeting without any help from the police. See Henry, 447 U.S. at 287 (Blackmun, J., dissenting) ("All Members of the Court agree that Henry's statements

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incriminating information from Henry "in myriad less direct ways" such as gaining Henry's confidence so that Henry felt free and could be subtly encouraged to discuss his past crime); Id. at 279 n.2 (Blackmun, J., dissenting) ("planted bug" in Massiah "underscored the agent's deliberate design to obtain incriminating information" and insured that the Massiah informant followed agent's instructions to elicit incriminating statements from Massiah).

were properly admitted if Nichols [the informant] did not 'prompt' him."').<sup>11</sup>

The police's relationship with Colson not only did not constitute "elicitation" but also did not satisfy the "deliberate" prong of the Massiah test. None of the police actions in this case was for the purpose of obtaining post-indictment incriminating statements from Moulton. The police placed the body wire on Colson in order to 1) protect Colson in the event

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<sup>11</sup> Neither Sixth nor Fourth Amendment rights are implicated by Moulton's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." See United States v. Henry, 447 U.S. at 272 (quoting Hoffa v. United States, 385 U.S. 293, 302 (1966)), 281 (Blackmun, J., dissenting), 297-98 (Rehnquist, J., dissenting); see also United States v. White, 401 U.S. 745, 752 (1971), cited in Henry, 447 U.S. at 272, and quoted in Henry, 447 U.S. at 298 n.7 (Rehnquist, J., dissenting).

that Moulton already realized, or should learn in the December 26th meeting, that Colson had become a police informant, and 2) learn more about Moulton's plans for killing and tampering with witnesses.<sup>12</sup> J.A. 53-54, 67, 85, 87; Moulton, 481 A.2d at 160; Pet. App. 13, 46. The purpose of the telephone recording device was to 1) investigate the threatening telephone calls

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<sup>12</sup> In addition to Colson's report of Moulton's plan to kill Gary Elwell (J.A. 75-77, 88), Gary Elwell himself reported to the police that he had received a threatening telephone call. J.A. 89-90. Moreover, two other State's witnesses complained to the police that they had been threatened. One of these witnesses was threatened by Moulton himself. J.A. 89. On this basis, the Maine Supreme Judicial Court found "ample evidence" to support the Suppression Hearing Justice's finding that the body wire and telephone recordings were made "for legitimate purposes not related to the gathering of evidence concerning the crime for which the defendant had been indicted." Moulton, 481 A.2d at 160; Pet. App. 12-13; see Pet. App. 48-49.

Colson said he had been receiving,<sup>13</sup> and 2) learn more about Moulton's plans to kill Gary Elwell. J.A. 50, 52, 67, 77, 87, 99; Pet. App. 45. And the agreement not to bring any additional charges against Colson was in exchange for his testimony at Moulton's trial. (Transcript of Jury-Waived Trial, Vol. II, at 293-95; see J.A. 63-66). Although the police were aware that Moulton would make post-indictment incriminating statements at the December 26th meeting (J.A. 86), the police actions were not for the purpose of obtaining these statements

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<sup>13</sup> Colson told the police he had received four threatening telephone calls. The fourth call was on November 3, 1982, the day before Colson made his initial contact with the police. J.A. 95.

and therefore were not deliberate under Massiah, Brewer, and Henry.

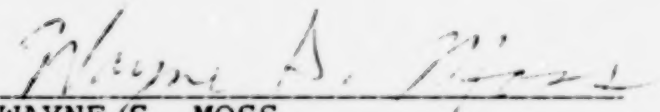
In the absence of both police "deliberateness" and "elicitation," it was Moulton, not the police, who created his incriminating situation. Hence, the police did not violate Moulton's Sixth Amendment right to counsel, and the opinion of the Maine Supreme Judicial Court holding to the contrary should be reversed.

CONCLUSION

Since Moulton's incriminating statements at the December 26th meeting were not deliberately elicited by the police, the judgment of the Supreme Judicial Court of Maine in State of Maine v. Perley Moulton, Jr., 481 A.2d 155 (Me. 1984), should be reversed.

Respectfully submitted,

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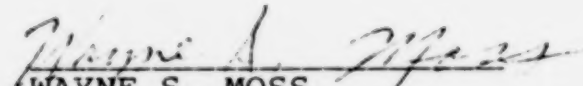
  
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I, Wayne S. Moss, Counsel of Record for Petitioner State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Brief for Petitioner" to be served on the only other party to this proceeding - viz., Perley Moulton, Jr. - by depositing said copies in the United States Mail on May 10, 1985, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1984

STATE OF MAINE, Petitioner,

PERLEY MOUTON, JR., Respondent.

ON WRIT OF HABEAS CORPUS TO THE SUPREME JUDICIAL  
COURT OF THE STATE OF MAINE

BRIEF FOR RESPONDENT

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**QUESTION PRESENTED**

Whether the Sixth Amendment right to counsel is violated under *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), where, in the course of an investigation of crimes for which a defendant has not yet been charged, the police obtain, as the result of interrogation by an undercover agent, in the absence of counsel, the defendant's incriminating statements about crimes for which he has already been charged?

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## STATEMENT

Perley Moulton, Jr. was charged with four counts of Theft by Receiving<sup>1</sup> in two indictments returned by the Waldo County Grand Jury on April 7, 1981.<sup>2</sup> J.A. 8-12.<sup>3</sup> Within two days of indictment Mr. Moulton appeared in open court represented by retained counsel. J.A. 1-2.

While these indictments were pending and after Mr. Moulton obtained representation by counsel, J.A. 1-2, Maine law enforcement officers met with Gary Colson, a co-defendant of Mr. Moulton.<sup>4</sup> J.A. 25-29. Specifically, Gary Colson met with Robert Keating, Chief of the Belfast Police Department on November 4, 1982, in Stockton Springs, Maine, J.A. 25-26, and with Robert Keating and Rexford Kelley of the Maine State Police on November 9 and 10, 1982, in Bangor and Orono. J.A. 28-29. At these meetings Gary Colson expressed concern about anonymous threats he had received over the telephone. J.A. 27-28, 51-52, 87. Gary Colson agreed to cooperate with the State in return for a guarantee that no

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<sup>1</sup> 17-A M.R.S.A. §401.

<sup>2</sup> On January 21, 1983 two additional indictments were returned against Mr. Moulton charging Burglary (17-A M.R.S.A. §401), Arson (17-A M.R.S.A. §802), and two counts of Theft (17-A M.R.S.A. §353). The 1983 indictments, which were based in part on the information obtained through the surreptitious recording of Mr. Moulton's conversations, involved the same incidents which provided the basis for the 1981 indictments. The 1981 indictments were dismissed by the State on June 7, 1983. J.A. 1-2. Mr. Moulton was ultimately convicted of Burglary and two counts of Theft under the 1983 indictments. J.A. 4, 6.

<sup>3</sup> "J.A." refers to the Joint Appendix filed in this case.

<sup>4</sup> The State opposed Moulton's motion to sever his trial from Colson's during the period Colson was acting as an undercover agent for the State. J.A. 21-22.

addition charges would be brought against him.<sup>5</sup> Trial Tr. 293-95. At these meetings Colson also provided Chief Keating and Detective Kelley with information about the crimes with which he had been charged, about other criminal activities and about a discussion with Mr. Moulton concerning harming other witnesses. J.A. 29-32.

As a result of these discussions between police officials and Gary Colson, Chief Keating and Detective Kelley met with Assistant District Attorney William Anderson and decided to provide Gary Colson with a recording device to install on his telephone.<sup>6</sup> J.A. 76-77. The recording device was provided to Gary Colson on November 12, 1982. J.A. 76. This recording device was subsequently used to record three telephone conversations between Gary Colson and Perley Moulton, none of which were introduced at trial.

In the first recorded telephone conversation, which occurred on November 21, 1982, Colson and Moulton discussed their interests in Amway, the sale of Mr. Moulton's automobile, a trip to New York and other personal matters. The only reference to the pending criminal charges in that conversation is reproduced in full below:

<sup>5</sup> Gary Colson confessed to arson, burglary, and multiple thefts with which he was never charged as a result of this agreement with the State. Trial Tr. 293-94. Arson is a Class A crime, 17-A M.R.S.A. §802, punishable by up to 20 years imprisonment, 17-A M.R.S.A. §1252(2)(A). Burglary is at least a Class C offense, 17-A M.R.S.A. §401, punishable by up to 5 years imprisonment, 17-A M.R.S.A. §1252(2)(C). Punishment for theft, 17-A M.R.S.A. §353, is, in general, dependent upon the value of the property stolen, 17-A M.R.S.A. §362. Colson's deal with the authorities was of substantial value to him.

<sup>6</sup> These law enforcement officers knew Mr. Moulton was represented by counsel. J.A. 47-48.

[Colson]

G.<sup>7</sup> So have you heard anything from the lawyer?

[Moulton]

P. No, I ain't heard a word, not anything at all. You?

G. No, no. Quiet.

P. Yeah, very quiet. I don't know. So it doesn't look like it's gonna go on this month and it probably won't go next month, so it'll be the first of the year.

G. Yeah, just when you wanted it, right?

P. No, I don't want it.

G. That's what I'm saying.

P. Yeah, yeah, well, what the hell? So anyways, mm-mm.

G. Yeah, I really don't (Laughing)

P. I come up with a method.

G. You did?

P. Yeah, Some day I'd like to get together and talk to you about it.

G. You.

P. After, I have to I have to work out the details on it.

G. Yeah.

P. But ah, it's a method.

G. Oh,

<sup>7</sup> The initial "G" is a reference to Gary Colson and the initial "P" to Perley Moulton.

- P. I'm gonna be up around Christmas time anyways, so
- G. Oh, ok!
- P. Ok?
- G. Ok.
- P. That'll give you some time to think, . . . .-think
- G. Ok.
- P. Yeah.
- G. Nothing you want to talk to me about right now then?
- P. Oh no!
- G. No.
- P. Nothing yet it's just something that's been rolling in my brains.
- G. G. Yeah.
- P. Oh, you know, what the heck?
- G. Well, that's ok.
- P. Yeah, I gotta research it thoroughly. (Laughing)
- P. Oh, a there ain't too much to talk about is there?
- G. Not really, (Laughing) It's it's awful though isn't it? Hunh?
- P. Yeah, I know it.
- G. It really is.

11/21/82 Telephone Call, Tr. 4-5.<sup>8</sup>

<sup>8</sup>Chief Keating testified at the suppression hearing that he believed that Moulton's comment that he had "come up with a

The two subsequent telephone calls occurred on December 1 and December 14, 1982. Those conversations focused primarily on the common interests of Colson and Moulton in cars, in Amway and in the upcoming trial on the indictments pending against them. In the last telephone conversation Moulton and Colson arranged to meet the Sunday after Christmas. J.A. 109-112. The purpose of that meeting was to discuss a joint strategy in the upcoming criminal trial.<sup>9</sup>The only reference to some other topic was made by Colson in this exchange:

[Moulton]

P. You know, I'd like to get together.

[Colson]

G. Yeah, I want to talk to you about what you said earlier too. You had something in the works there.

P. Yeah.

G. Ok?

P. Oh yeah.

G. Yeah, alright, we can talk Sunday anyway.

J.A. 110.

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method" in this telephone conversation was a reference to a plan to eliminate witnesses. J.A. 88. There is nothing in the conversation which supports this interpretation, and events after the fact suggest that Moulton was talking about an approach to meeting the State's proof at trial.

<sup>9</sup>The portions of the last recorded telephone conversation reproduced in the Joint Appendix included references to reviewing "the whole plan" on December 26. J.A. 110. Read in the context of that entire conversation, the "plan" was the strategy to be followed in the upcoming joint criminal trial. 12/14/82 Telephone Call.

Chief Keating received the tapes of the telephone conversations between Colson and Moulton shortly after they were recorded. J.A. 82. After learning about the meeting planned between Colson and Moulton on December 26, 1982, he and other unnamed law enforcement officials decided to place a body wire transmitter on Gary Colson for the purpose of record that meeting. J.A. 84-85. It is reasonable to assume that a representative of the District Attorney's Office participated in this decision, as one had earlier participated in the decision to record the telephone conversations between Moulton and Colson. J.A. 76.

The purpose of the body wire recording of the December 26 meeting between Colson and Moulton was described by Chief Keating at the suppression hearing as follows:

For two reasons—number (1) in my mind was his safety. At that point, he had received some threats; we did not know from whom those threats were coming; the risk that Perley might have realized that now Gary was cooperating with the Police, and (2) to see if we could hear and record any conversations about doing away with witnesses in the case or tampering with witnesses, trying to put pressure on witnesses, and for any other conversations that they might have. J.A. 85.

Gary Colson also testified at the suppression hearing that the reasons for the body wire were his safety and to record plans to do away with witnesses. J.A. 67. Colson admitted that Moulton had not threatened him and that he did not expect anything to happen at the December 26 meeting. J.A. 54-55.

Chief Keating testified at the suppression hearing that he and Detective Kelley instructed Gary Colson not to question Perley Moulton in the December 26 meeting,

"just be himself in his conversation." J.A. 87. Colson testified that he had been instructed "just to be myself." J.A. 62. The December 26 meeting occurred in Colson's home with Chief Keating and Detective Kelley within a couple of hundred yards listening to the conversation. J.A. 61-63, 92.

The discussion at the December 26 meeting primarily concerned preparation for the upcoming criminal trial. Portions of four pages of the 122-page transcript of the tape of the meeting contain a discussion of the issue of eliminating witnesses with poison darts. 12/26/82 Body Wire, Tr. 18-21. Early on in that discussion Moulton disclaims interest in going forward with the scheme. 12/26/82 Body Wire, Tr. 18 ("Yeah, but ah I don't think we ought to go for it."). This discussion ultimately evolves into joking about the difficulties in obtaining poison. 12/26/82 Body Wire, Tr. 20-21.

Several portions of the tapes of the December 26 meeting between Colson and Moulton were introduced into evidence against Moulton at his trial.<sup>10</sup> Trial Tr. 331-40. Those portions of the December 26 meeting introduced at trial are replete with interrogation of Perley Moulton, Jr. by Gary Colson as to details of the crimes for which both were currently under indictment. Colson continually asked specific questions of Moulton, or made statements designed to generate an incriminating response, including the following:

[Colson] ". . . . One I cannot remember Caps, just can't remember, I know it was in December, what night did we break into Lothrop Ford? What date?"

<sup>10</sup> Transcripts of those portions of the tapes of the December 26 meeting introduced into evidence appear in the Joint Appendix at 113-151.

J.A. 114

[Colson] "How many times did we drill them fucking locks, hunh?"

J.A. 115

[Colson] "Oh shit, remember, remember when we took the pick up out through there and we, and we dumped all of the stuff off it, that truck out back. Then I drove it back and then we, then I dumped it into whatever pond it was out there."

J.A. 116

[Colson] ". . . Did you follow me, yah, you followed me up there, or did you, no. Yah, you did. O.K."

J.A. 120

[Colson] "O.K. there's another thing now we still don't know what date Lothrop Ford was broken into. O.K., we stole the Mustang on the 13th of December and we stole the dump truck on the 13th of January."

J.A. 124

[Colson] "Oh shh-what do you think killed us on this?"

J.A. 125

[Colson] "What time did we break in that night? Must have been early."

J.A. 134

[Colson] ". . . How many holes did you drill, sir?"

J.A. 135

[Colson] "Is it hard for you to talk on the phone?"

J.A. 139

[Colson] "See the thing is Caps, even how this reads you're still an accessory to it."

J.A. 150

Counsel for Moulton moved to suppress Moulton's statements to Colson, which motion was denied by a Justice of the Superior Court, J.A. 3, 5-6, 16-19; Pet. App. 43-49. The Maine Supreme Judicial Court unanimously reversed Moulton's convictions on the ground that his Sixth Amendment rights had been violated by the introduction into evidence of certain incriminating statements made by him during the December 26, 1982, meeting with Colson. Pet. App. 1-19. The standard applied by the Maine Supreme Judicial Court in reviewing the Superior Court Justice's ruling on the motion to suppress was whether there was rational support in the record for the conclusions of the Superior Court Justice. Pet. App. 12. The Maine Supreme Judicial Court acknowledged that there were legitimate purposes served by the police investigation of Moulton's alleged statements to Colson and other threats to witnesses. Pet. App. 12-13. The Court concluded that a proper motive did not immunize the incriminating statements used against Moulton from constitutional scrutiny. The Court reviewed the transcript of the Colson-Moulton meeting and concluded "that Colson was not merely a 'passive listener.'" Pet. App. 17. The Supreme Judicial Court determined that ". . . Colson frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial" and that Chief Keating should have anticipated that this would occur. Pet. App. 17-18. This was the essential basis upon which the Court held that Moulton's Sixth Amendment rights had been violated; the incriminating statements used against him at

trial had been deliberately elicited from him by an agent of the State.

#### SUMMARY OF ARGUMENT

The constitutional right to counsel of a defendant in a criminal action is fundamental to the fairness of the criminal justice process. *United States v. Morrison*, 449 U.S. 361, 364 (1980). This Court has recognized the significance of the role of counsel and accorded the right to counsel substantial protection. See, e.g. *Powell v. Alabama*, 287 U.S. 45 (1932); *Gideon v. Wainwright*, 372 U.S. 385 (1963); *Evitts v. Lucey*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 830 (1985). Access to counsel is a defendant's key to obtaining information about his or her constitutional and other rights under law. As an advocate counsel is instrumental in asserting the rights and the interests of a defendant in the adversary criminal justice process. *United States v. Cronin*, \_\_\_ U.S. \_\_\_, 104 S. Ct. 2039, 2044 (1984).

The role of counsel is particularly important at trial and at certain "critical stages" of the criminal justice process. Among those stages which have been recognized by this Court as "critical" for the purpose of ensuring that the right to counsel is clearly understood and counsel is readily available, is the stage at which agents of the state undertake interrogation of a defendant concerning an offense with which he has been formally charged. *Massiah v. United States*, 377 U.S. 201 (1964); *Brewer v. Williams*, 430 U.S. 387 (1977).

The Maine Supreme Judicial Court correctly concluded that the police agent Colson obtained the incriminating statements which were introduced against Respondent Moulton at trial by pressing him for the details of the criminal offenses for which he was under indictment and

represented by counsel. The State can not disclaim the conduct of its agent, and the Maine Supreme Judicial Court is correct in its conclusion that this conduct should have been anticipated by the police officials involved.

Interrogation of a defendant charged in a criminal case generates the right to counsel by making the encounter between a defendant and a police agent a critical stage of the criminal justice process. The conduct in this case which led to the incriminating statements by Moulton is precisely the type of conduct which *Massiah*, *Brewer*, and *United States v. Henry*, 447 U.S. 264 (1980), sought to restrict.

If the State undertakes to use at trial incriminating statements obtained from a defendant after that defendant has been formally charged with the criminal offense for which he is being tried, the State should be required to establish by clear and convincing evidence at least, (1) that it had a legitimate purpose other than the continuing investigation of the pending criminal offense in sending a police agent against the defendant, and (2) that the conduct of the police agent related to and was consistent with that legitimate purpose. While the State in this case, as in *Massiah*, may have had a legitimate purpose in investigating Colson's allegations that Moulton had discussed eliminating witnesses, Colson's interrogation of Moulton about the details of the pending criminal offense rendered the admission of portions of that interrogation into Moulton's trial a violation of Moulton's Sixth Amendment right to counsel.

## ARGUMENT

### I. THE STATE "DELIBERATELY ELICITS" INCRIMINATING STATEMENTS WHEN AN AGENT OF THE STATE CONDUCTS A SURREPTITIOUS INTERROGATION OF AN INDICTED DEFENDANT AS TO PENDING CRIMINAL OFFENSES.

#### A. The Incriminating Statements Of Respondent Moulton, Introduced At Trial, Were, To A Significant Extent, The Result Of Direct Questioning And Prompting By Gary Colson As To The Details Of The Pending Criminal Offenses.

As the Maine Supreme Judicial Court pointed out:

A review of the transcript of the Colson-Moulton meeting makes clear that Colson was not merely a "passive listener." . . . Instead, Colson frequently pressed Moulton for details of various thefts and in so doing elicited much incriminating information that the State later used at trial. Pet. App. 17-18

In the transcripts of the portions of the tapes introduced as evidence in Moulton's trial, one frequently sees specific questions asked by Colson as to details of the pending criminal offenses. In a manner plainly designed to elicit incriminating admissions, Colson asked Moulton for dates (J.A. 114, 124), for times (J.A. 134), and a whole variety of other details (J.A. 115, 120, 125, 135). Moulton responded to these questions with unambiguous admissions of guilt.

In addition to asking questions, Colson prompted Moulton to talk about the details of the case and about his guilt. *See e.g.*, J.A. 116 (dumping truck into pond); J.A. 124-125 (details of Lothrop Ford break-in and cause of problems); J.A. 127 (details of theft of pick-up truck); J.A. 150 (general concern about pending cases). Colson asked Moulton to ask him questions about the details of the

offenses. J.A. 129. Colson asked Moulton if it is hard for him to talk on the telephone and then prompted him. J.A. 139-140. Colson described Moulton as an accessory to arson and then prompted him to respond. J.A. 150-151.

The overwhelming impression one is left with after reviewing the portions of the tapes of the December 26 meeting admitted into evidence against Moulton is that of an effective interrogation of Moulton about the details of the pending criminal offenses and Moulton's involvement in those offenses.

#### B. Gary Colson Was An Agent Of The State And The State Did Not Adequately Protect Against Colson's Interrogation Of Perley Moulton As To The Details Of Pending Criminal Offenses.

The Main Supreme Judicial Court concluded that the warning given by Maine law enforcement officials to Gary Colson not to question Moulton provided insufficient protection for Moulton's Sixth Amendment rights. Pet. App. 18.

This conclusion is best understood in the context of the entire relationship which these officials had with Gary Colson. In November, 1982, Gary Colson had thrown in his lot with Maine law enforcement officials. He had met several times with Chief Keating and Detective Kelley and had confessed his role in the criminal charges pending against him as well as in other criminal activities. J.A. 29-30, 74-76. He had made a deal with these law enforcement officials in return for agreeing to testify against Perley Moulton. Trial Tr. 293. His deal consisted of the State's promise that he would not be charged with any additional offenses. Apparently no promises were made in regard to sentencing on the charges then pending against Gary Colson.

By the time of the December 26th meeting between Colson and Moulton, Colson was fully cooperating with state law enforcement officials. He had recorded three telephone conversations with Perley Moulton and had promptly turned those tapes over to Chief Keating. J.A. 82-83. He had consented to and was fitted with a body wire transmitter for the purpose of broadcasting to law enforcement officials the discussions he had with Perley Moulton at the December 26 meeting. J.A. 84-86.

Because Colson had confessed his participation in the criminal offenses for which he had been indicted and because he had made no deal on sentencing for those offenses, Colson had committed himself in a substantial way to the mercy of Maine law enforcement officials. It would be expected that he would do his best to please those officials. He would be foolish to do anything else.

Maine law enforcement officials had an obvious interest in convicting Perley Moulton of the offenses with which he had been charged in addition to protecting witnesses allegedly threatened by Moulton. Gary Colson must have understood this. He must also have understood that his original allegations to law enforcement officials about Perley Moulton's threats against witnesses had received little or no support in the three recorded telephone conversations with Perley Moulton.<sup>11</sup> Up to the time of the

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<sup>11</sup> Chief Keating testified at the suppression hearing that he believed that Moulton's comment that he had "come up with a method" in first recorded telephone conversation was a reference to a plan to eliminate witnesses. J.A. 88. There is nothing in the conversation that supports this interpretation and events after fact suggest that Moulton was talking about a method of meeting the State's proof at trial. The only other alleged reference to eliminating witnesses in the three telephone conversations is one made by Colson in the December 14 conversation about "something in the works." J.A. 110.

December 26 meeting Gary Colson had produced very little in the way of independent evidence against Perley Moulton.

Similarly, Maine law enforcement officials had received little or nothing to corroborate independently Gary Colson's allegations about Perley Moulton's threats against witnesses. Further, it must have been clear to those law enforcement officials from listening to tapes of the telephone conversations that the purpose of the December 26 meeting was to prepare for the upcoming consolidated trial of Colson and Moulton.<sup>12</sup>

During this period the State had opposed Moulton's motion to sever his trial from Colson's. J.A. 21-22. The Maine Supreme Court specifically found that Chief Keating should have anticipated that the pending criminal charges would be discussed at the December 26 meeting. Pet. App. 15-17. Indeed, Chief Keating admitted at the suppression hearing that he was aware that the cases for which Perley Moulton was under indictment would probably be discussed. J.A. 86.

Despite the circumstances which established that the purpose of the December 26 meeting was the discussion of trial strategy by two co-defendants, the State went ahead with the recording of the meeting. The testimony of Chief Keating at the suppression hearing suggests that Gary Colson was instructed "not to attempt to question Perley Moulton, just be himself in his conversation, that he could agree or disagree with anything that he said, . . . ." J.A.

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<sup>12</sup> The portions of the last recorded telephone conversation reproduced in the appendix include references by Moulton to reviewing "the whole Plan" on December 26. J.A. 110. Read in the context of that entire conversation the "plan" was the strategy to be followed in the upcoming criminal trial. 12/14/82 Telephone Call.

87. Colson's recollection was that he was instructed "[j]ust to be myself." J.A. 61-62.

Gary Colson, by the time of the December 26 meeting, was functioning as an agent for the State and was in a precarious position with Maine law enforcement officials. Maine law enforcement officials were interested in convicting Perley Moulton. Given the circumstances of this case Gary Colson must have been aware of that interest. At a minimum Maine law enforcement officials did not adequately impress upon Colson the importance of avoiding direct questioning of Moulton in regard to the pending criminal offenses. They then took full advantage of the fruits of that questioning.

**C. The Incriminating Statements Of Mr. Moulton That Were Introduced Against Him At His Trial Were "Deliberately Elicited" By The State.**

The facts of *Massiah v. United States*, 377 U.S. 201 (1964), are strikingly similar to the facts of this case.<sup>13</sup> The cooperating undercover agent was an indicted co-defendant of Massiah. He had a history of association with Massiah and they were apparently friendly. In this case, Moulton and Colson were co-defendants and friends. In each case the incriminating statements were broadcast by a hidden transmitter to government agents hidden nearby. In each case the government asserted a law enforcement interest for its investigation other than merely gathering evidence in support of pending indictments.

The State and the United States as *amicus curiae* assert that *Massiah* may be distinguished from this case

<sup>13</sup> The last names of the undercover agents in both cases were the same, Colson. No relationship has yet been established between them.

because here the State arguably did not create the situation which induced the defendant's incriminating statements, and to the extent the State participated in the December 26 meeting, it was not for the purpose of obtaining post-indictment incriminating statements from Moulton. State's Br. 29-34, 36-37; U.S. Br. 7, 18-19.

In formulating its definition of elicitation the State ignores the context of the meeting and the actual conduct of the undercover agent in *Massiah* and in this case, both of which amount to ". . . interrogation by a government agent." 377 U.S. at 206 (quoting from 307 F.2d at 72-73).

The central issue in this case is whether the Sixth Amendment protects an individual who has been formally charged with a criminal offense from a surreptitious interrogation as to that offense by a person cooperating with the government. While the conduct and intentions of law enforcement officers regularly employed on a full-time basis by government are important in evaluating whether an indicted and represented defendant's Sixth Amendment rights have been violated, it is also essential to consider the conduct of the undercover agent of those law enforcement officers. It is the conduct of the undercover agent which has a direct impact on the defendant. It is the conduct of that agent that directly "elicits" the incriminating statements from the defendant.

In each of the significant Sixth Amendment cases in this area, there was active involvement by law enforcement officers or their surrogate agents in directly eliciting incriminating statements. In *Massiah*, as noted above, this Court accepted a characterization of the encounter between Massiah and the undercover agent as an "interrogation." In *Brewer v. Williams*, 430 U.S. 387 (1977), this Court accepted the characterization of the so-called "Christian burial speech" as tantamount to interrogation.

As the Court described it in *Brewer*, “. . . the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him.” 430 U.S. at 401.

In *United States v. Henry*, 447 U.S. 264 (1980), the undercover agent had “some conversations” with Henry and “Henry’s incriminating statements were ‘the product of this conversation.’” 447 U.S. at 271. This Court in *Henry* stated explicitly its view that “. . . affirmative interrogation, absent waiver, would certainly satisfy *Massiah*.” 447 U.S. at 271. For one Justice the requirement of at least “the functional equivalent of interrogation” was conduct necessary to the conclusion that the incriminating statements had been “deliberately elicited.” 447 U.S. at 277 (Powell, J., concurring).

While the *Massiah* doctrine may extend to conduct on the part of government agents which does not constitute interrogation or its functional equivalent,<sup>14</sup> certainly conduct which constitutes interrogation is subject to the doctrine. The surreptitious *interrogation* of the defendant by a secret government agent in the absence of the defendant’s attorney constitutes a most flagrant breach of the relationship between a defendant and his attorney.

The State and the United States contend that this Court should focus on the fact that Perley Moulton

<sup>14</sup> In *United States v. Henry*, this Court rejected the government’s contention that *Brewer* modified the “deliberately elicited” test set forth in *Massiah*. 447 U.S. at 271. See generally *Kamisar, Brewer v. Williams, Massiah, and Miranda: What is “Interrogation”? When Does It Matter?*, 67 Geo. L. J. 1 (1978). In *Beatty v. United States*, 389 U.S. 45 (1967), this Court applied the *Massiah* doctrine in a case where the government agent had neither arranged the meeting nor interrogated the defendant in any manner.

arranged the December 26 meeting with Gary Colson and that the law enforcement officials involved did not expressly instruct Colson to seek incriminating statements from Moulton concerning the pending criminal charges against him. State’s Br. 40-41; U.S. Br. 15-17.

The State is correct in its contention that Mr. Moulton arranged the December 26 meeting with Gary Colson. This one fact among many does not end the analysis. This Court in *Henry* held it:

. . . irrelevant that in *Massiah* the agent had to arrange the meeting between *Massiah* and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused. 447 U.S. at 272, n.10.

Colson was a codefendant of Moulton. He was a business associate and a friend. They were scheduled, at the State’s insistence, to be tried together on the same criminal charges. They apparently had a history of close communication. The law enforcement officers involved in the Moulton case were indeed fortunate to have Gary Colson as a cooperating undercover agent. They could hardly help anticipating that there would be continuing contacts and conversations between Moulton and Colson. Provision of the telephone recording device to Colson early on with instructions to record telephone conversations with Perley Moulton illustrates that expectation on the part of law enforcement officials. J.A. 76-77, 97-98.

In *Beatty v. United States*, 389 U.S. 45 (1967), a meeting was suggested by the indicted defendant Beatty and the undercover agent merely attended the meeting with a federal law enforcement agent hidden in the trunk of the undercover agent’s car. This Court reversed the decision of the Court of Appeals for the Fifth Circuit, which had found no violation of the Sixth Amendment, explicitly

relying on its decision in *Massiah*.<sup>15</sup> Because of the extensive interrogation of Moulton by undercover agent Gary Colson, this case is factually an even stronger case than *Beatty* for the application of the *Massiah* doctrine.<sup>16</sup>

While this Court has recognized "that the core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor," this Court has consistently reaffirmed a role for counsel in certain pretrial confrontations between an agent of the government and a defendant against whom the criminal process has been formally invoked. *United States v. Ash*, 413 U.S. 300, 309, 311-312 (1973). This Court has suggested that the role of counsel at a pretrial surreptitious interrogation of a defendant might involve advising his client on his Fifth Amendment rights and

<sup>15</sup> For a discussion of the significance of *Beatty*, see Dix, *Undercover Investigations and Police Rulemaking*, 53 Texas L. Rev. 203, 232-236 (1975). See also Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does It Matter?*, 67 Geo. L. J. 1, 44 n.286 (1978).

<sup>16</sup> The United States attempts to undermine the force of *Beatty* by suggesting that *Beatty* was a summary disposition. U.S. Br. 17-18, n.12. The reversal of the Fifth Circuit decision in *Beatty* came within three years of the decision in *Massiah* and was based explicitly on *Massiah*. The suggestion by the United States that *Brewer v. Williams* supports the contention that *Beatty* did not extend the *Massiah* doctrine to the mere acquisition of statements from the defendant ignores the fact that *Brewer* did not involve an encounter with a secret government agent and this Court's comment in *Henry* that "we are not persuaded, as the Government contends, that *Brewer v. Williams*, 430 U.S. 387 (1977), modified *Massiah*'s 'deliberately elicited' test." 447 U.S. at 271.

protecting him against prosecutorial overreaching. 413 U.S. at 312. This confrontation constitutes a critical stage in the criminal justice process because, like post-indictment line-ups, it has the potential "to settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967); *United States v. Gouveia*, — U.S. —, 104 S.Ct. 2292, 2298 (1984).

The suggestions by the State and the United States that this Court should not apply *Massiah* to protect Perley Moulton's Sixth Amendment right to counsel because Moulton arranged the meeting with Gary Colson at which Colson elicited Moulton's incriminating statements are formalism of the worst sort. The government should not be permitted to take advantage of an indicted and represented defendant at a meeting which comes about ostensibly at the initiative of the defendant but which reflects the close relationship and the common peril of the defendant and the undercover agent who is a co-defendant in a pending joint trial. As the Maine Supreme Judicial Court suggested, "The fact that Moulton and Colson were friends and co-defendants was of central importance in this case." Pet. App. 15.

In short, it may be true, but it is trivial that Moulton arranged the December 26 meeting with Colson. The State did little to protect against Colson's interrogation of Moulton as to the details of the pending criminal offenses. The instructions given to Colson were vague. He was largely dependent on the good will of the law enforcement officials involved and it was clear to all concerned that the purpose of the December 26 meeting was to discuss strategy in the upcoming joint criminal trial. In the totality of the circumstances of this case, Mr. Moulton's Sixth Amendment right to counsel was violated by the State.

**II. THE LEGITIMATE PURPOSE OF THE STATE IN INVESTIGATING ALLEGATIONS OF POSSIBLE FUTURE CRIMES SHOULD NOT IMMUNIZE FROM CONSTITUTIONAL SCRUTINY THE CONDUCT OF THE STATE'S UNDERCOVER AGENT IN OBTAINING INCRIMINATING STATEMENTS REGARDING PENDING CRIMINAL CHARGES.**

This Court pointed out in *Massiah*:

We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted. All that we hold is that the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial. 377 U.S. at 207.

Certainly the State is not prohibited from investigating allegations of completed or proposed criminal conduct involving an individual formally charged with other criminal conduct. *Hoffa v. United States*, 385 U.S. 293 (1966). The question confronted in this case is whether the fact that the State was investigating allegations of other criminal conduct should immunize the conduct of its officers in failing to protect adequately against the elicitation of incriminating statements regarding pending offenses and the conduct of its agent in directly eliciting those statements.

The United States suggests that the language of *Massiah* quoted above should be read narrowly because an exception for a related crimes investigation would have "swallowed the rule" in the context of *Massiah*. U.S. Br. 23-24. This is true not only in the context of *Massiah* but also in the context of this case and, perhaps, most cases. If the government need only assert that it is investigating a

"related crime" in justification of its elicitation and use of incriminating statements regarding pending crimes, as a matter of practical impact there will be no *Massiah* rule.

The suggestion that an investigation of a new crime will legitimize the admission of incriminating statements relating to a pending offense has been explicitly rejected by at least one circuit. *Mealer v. Jones*, 741 F.2d 1451 (2d Cir. 1984), *cert. denied*, No. 84-6210 (April, 1985).<sup>17</sup>

In *Massiah* the government was investigating the source of narcotics, the intended buyer of narcotics, and the participants in a large and well-organized drug ring. 377 U.S. at 206. In this case the State was investigating threats against witnesses in a pending case. Other cases have involved government investigations of obstruction of justice and subornation of perjury in pending criminal cases. See *United States v. Darwin*, 757 F.2d 1193 (11th Cir. 1985); *Mealer v. Jones*, 741 F.2d 1451 (2d Cir. 1984), *cert. denied*, No. 84-6210 (Apr. 1, 1985); *United States v. DeWolf*, 696 F.2d 1 (1st Cir. 1982); *Grieco v. Meachum*, 533 F.2d 713 (1st Cir.), *cert. denied*, 429 U.S. 858 (1976).

In each of these cases there is an obvious relationship between the "new crime" investigated by the government

<sup>17</sup> In *Mealer* the Second Circuit recognized a general prohibition based on *Massiah* on the admission of incriminating statements obtained after indictment despite the fact that the statements were obtained in investigation of a scheme to bribe a witness to the pending offense. The Second Circuit Court of Appeals did not regard the fact that Mealer had arranged the meeting with the undercover agent as dispositive of the *Massiah* claim. Nor did it regard the new crimes justification offered by the government as sufficient to avoid the prohibition of *Massiah*. This court need not go so far as did the Second Circuit Court of Appeals in *Mealer* to accept Respondent's position in this case that a new crimes investigation does not provide a blanket for the conduct of government agents.

and the pending crime with which the defendant under investigation had been charged. This relationship often makes it difficult to separate out incriminating statements relating to pending crimes from evidence of new crimes. So, for example, in *United States v. Darwin*, Darwin was jointly tried for the pending crime (drug charges) and the "new crime" (obstruction of justice). Incriminating statements obtained during the investigation of the new crime were admitted at the trial without limitation. Most of those incriminating statements concerned the new crime. The two statements concerning the old crime apparently came up during the discussion of the new crime. 757 F.2d at 1197. In this context, the Court of Appeals for the Eleventh Circuit held the statements admissible noting that "we conclude that the right to presence of counsel simply does not extend to a situation in which the defendant is engaged in the commission of a separate offense." 757 F.2d at 1200.

Similarly, in two First Circuit cases, *United States v. De Wolf* and *Grieco v. Meachum*, in which the government investigated efforts to intimidate and to bribe witnesses to obtain perjured testimony, and obtained incriminating statements, the court found no *Massiah* violation. However, in each case the court noted that those statements were not "innocuous except for their implication of consciousness of guilt of the prior crime." 696 F.2d at 3; 533 F.2d at 718. In *Grieco v. Meachum*, Judge Coffin explicitly suggested that the decision of the court might have been different if the incriminating statements only related to pending offenses. 533 F.2d at 718.

In each of these cases, the courts of appeals, while allowing the admission at the trial of the prior crime of incriminating statements obtained while charges concerning the prior crime were pending, concluded that

those incriminating statements were obtained while the defendant was actually engaged in the commission of a new crime or the statements were in themselves incriminating as to both the prior crime and the new crime. None of these statements were simply incriminating statements relating to the pending crime elicited without reference or even relevance to the new crime investigation—the situation we have in *this* case.

This Court should not rule that a legitimate "other crimes" purpose on the part of law enforcement officers justifies the use of incriminating statements elicited while there are pending criminal charges regardless of how those statements are elicited or whether or not those statements are relevant to the "other crimes" investigation. Such a ruling would create a potential for subterfuge which would be difficult or impossible for a defendant to establish. Law enforcement officers will always be motivated to develop evidence for a pending criminal case and it will be tempting indeed to initiate a new crimes investigation if the door is open to the use of any incriminating statements obtained in the course of that investigation at trial on the pending charge.<sup>18</sup> If the government can justify the admission of incriminating statements by showing merely that they were obtained in the context of an "other crimes" investigation, there will be little significance left to the rule of *Massiah* and *Henry*.

### III. IN THE TOTALITY OF THE CIRCUMSTANCES OF THIS CASE THE STATE VIOLATED MOULTON'S SIXTH AMENDMENT RIGHT TO COUNSEL.

In the context of this case Moulton's Sixth Amendment right to counsel was violated when his incriminating

<sup>18</sup> See *Dix, Undercover Investigations and Police Rulemaking*, 53 Texas L. Rev. 203, 234 (1975).

statements were admitted into evidence against him at trial. While Moulton arranged the meeting at which those incriminating statements were obtained, he was subject to surreptitious interrogation as to pending criminal charges by an agent of the State at that meeting. If there is any license provided to the State to obtain incriminating statements because the State is investigating some "other crime," the scope provided by that license was grossly exceeded in this case.

Maine law enforcement officials were aware that the pending criminal charges would be discussed at the December 26 meeting. They were well aware of the relationship between Moulton and Colson. They should have been aware of the obvious incentive Colson had to produce incriminating statements by Moulton for use in the trial of the pending criminal charges. They did little to protect against the blatant interrogation of Moulton which ultimately occurred at the December 26 meeting. In the words of the Maine Supreme Judicial Court "they intentionally created a situation that they knew, or should have known, was likely to result in Moulton's making incriminating statements during his meeting with Colson." Pet. App. 18. This case represents a clear violation of the standard set forth by this Court in *United States v. Henry*, 447 U.S. at 274.

If the government wishes to use at trial incriminating statements which were obtained by its agent once the formal adversary process has begun absent counsel or a valid waiver of counsel, at a minimum the government should be required to show, by clear and convincing evidence, that it had a legitimate purpose in sending its agent against the defendant, that is, a purpose other than merely obtaining evidence relating to the pending crime. The government should also be required to show that its

agent did not act outside the scope of the justification provided by its legitimate purpose in obtaining incriminating statements relating to a pending offense.

This approach would accommodate the values which *Massiah* and *Henry* sought to protect, the significance of the attorney-client relationship in our adversary system of criminal justice, and our sense of unfairness in the government seeking additional evidence surreptitiously from the defendant's own mouth once the formal adversary process has commenced. When the government obtains incriminating statements from a defendant relating to a pending offense for which the right to counsel has attached, it is only fitting that the government should bear a substantial burden in establishing that it had a legitimate purpose in dealing with the defendant and that its agent did not exceed that purpose in obtaining the incriminating statements.

This approach would also accommodate the societal interest in effective law enforcement by not only making clear that police officials may investigate new crimes despite a pending criminal offense, but also by allowing the use of incriminating statements at trial on the pending offense when the government satisfies the court that the incriminating statements were obtained as an integral part of a legitimate new crimes investigation.

Applying the proposed test to this case, a court might well find that the State was legitimately engaged in a new crimes investigation. The Superior Court made this finding, Pet. App. 48, and the Supreme Judicial Court found this finding supported by ample evidence. Pet. App. 13.

It is the second part of the proposed test that the State can not meet in this case. The incriminating statements obtained from Moulton were not related to the investiga-

tion of threats against witnesses. They were obtained as the result of an independent interrogation of Moulton about the details of the pending crimes. In that way this case is unlike those in which some courts of appeals have held such incriminating statements admissible. See *United States v. Darwin, supra*; *United States v. De Wolf, supra*; and *Grieco v. Meachum, supra*. It is this interrogation which was particularly troubling to the Maine Supreme Judicial Court (Pet. App. 17-19) and which, under *Massiah* and *Henry*, plainly violates the United States Constitution.

### CONCLUSION

The incriminating statements obtained by law enforcement agents from Respondent Perley Moulton, Jr. were admitted at trial in violation of Mr. Moulton's Sixth Amendment right to counsel. Accordingly, the decision of the Maine Supreme judicial Court on this issue should be affirmed.

Respectfully submitted,

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①  
No. 84-786

Supreme Court, U.S.

FILED

SEP 28 1985

JOSEPH F. SPANIOLO, JR.

CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STATE OF MAINE,  
Petitioner

v.

PERLEY MOULTON, JR.,  
Respondent

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF THE  
STATE OF MAINE

REPLY BRIEF FOR PETITIONER

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## INTRODUCTION

Respondent's reading of Massiah v. United States, 377 U.S. 201 (1964), Brewer v. Williams, 430 U.S. 387 (1977), and United States v. Henry, 447 U.S. 264 (1980), stretches the Sixth Amendment beyond recognition and should be rejected. Respondent asserts in his brief that his right to counsel was violated by the admission of statements he made to Colson, a police informant, during a meeting he himself had arranged. That argument glosses over the fact that the State did nothing either to arrange the meeting or to encourage any particular questioning of the Respondent by Colson. It also ignores the manifest need for Colson, in order to protect his cover, to participate fully in the discussion. Under these circumstances, no Sixth Amendment violation occurred

because the Sixth Amendment does not apply to non-government-created confrontations of a defendant. Moreover, as Respondent concedes, the police here were acting in good faith to investigate possible crimes other than the crime for which Respondent had been indicted. Exclusion of statements relating to the pending charges made during discussions of possible perjury would neither deter police misconduct nor ensure protection of the adversary system, and should not be required here.

I. THERE WAS NO  
"DELIBERATE  
ELICITATION" UNDER  
MASSIAH V. UNITED  
STATES, 377 U.S. 201  
(1964), BECAUSE  
MOULTON, NOT THE  
POLICE, CREATED HIS  
INCRIMINATING SITUATION.

All of Moulton's incriminating  
statements at his meeting with Colson on

December 26, 1982, were made on Moulton's own initiative. Some of these statements were made without any prompting by Colson. J.A. 137, 142-43, 146-50. Other statements were made in response to Colson's questions and statements. Both kinds of statements, however, were made in the context of developing Moulton's ideas for their trial strategy and testimony - a context that had been created by Moulton.

Although conceding that Moulton arranged the December 26th meeting with Colson, Respondent contends that this fact is constitutionally irrelevant (Brief for Respondent at 19-21) in view of Colson's "interrogation" of Moulton. (Brief for Respondent at 12-21). This argument is both legally and factually wrong.

Respondent minimizes the importance of the fact that Moulton arranged the meeting with Colson on the basis of a statement in United States v. Henry, 447 U.S. 264 (1980), where the Court deemed it "irrelevant that in Massiah the agent had to arrange the meeting between Massiah and his codefendant while here the agents were fortunate enough to have an undercover informant already in close proximity to the accused." Henry, 447 U.S. at 272 n.10. The Court's statement should be confined, however, to the facts in Henry. There the issue of who initiated conversations between Henry and the informant-jailmate was "irrelevant" because the government, through its contingent-fee arrangement with the informant and through Henry's custody, had otherwise created a situation likely to

induce Henry's incriminating statements. Moreover, the majority of the Court found no evidence that Henry himself had created his incriminating situation.<sup>1</sup>

In contrast to Henry, here there is not only abundant evidence that Moulton himself created his incriminating situation but also no custody and no contingent-fee or other arrangement between Colson and the police to overshadow the constitutional significance of that evidence.<sup>2</sup> Moulton created his incriminating situation

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<sup>1</sup> Contra Henry, 447 U.S. at 288 (Blackmun, J., dissenting) (record supports inference that Henry, not the informant, "was the moving force behind any mention of the crime").

<sup>2</sup> As discussed at pp. 16-23, infra, Respondent's effort to suggest that the police gave Colson incentives similar to the contingent-fee arrangement in Henry, i.e., the body wire, dropping of charges, open sentencing, and the State's opposition to a motion for severance, does not withstand analysis.

by initiating all of the contacts between himself and Colson, including the December 26th meeting, in order to obtain Colson's aid for Moulton's trial defense plans.

(See Brief for Petitioner at 41-49).

Moulton put on the agenda of the December 26th meeting a complete discussion of their trial strategy, which included a thorough review of the discovery materials received from the prosecutor in order to prepare their perjured testimony. J.A. 109-12; Brief for Petitioner at 42-45. At the meeting itself, Moulton incriminated himself by expanding, without any prompting by Colson, on the idea he initially proposed in his telephone conversation with Colson on December 2, 1982, that a defense at trial would be to blame Gary and David Elwell for the crimes charged to Moulton

and Colson. (See Transcript of Recorded Telephone Conversation, dated December 2, 1982, at 5-6). For example, near the beginning of the December 26th meeting Moulton initiated discussion of his earlier idea by stating that he had an idea for their defense and wanted "to turn this thing right around and pin it on [Gary] Elwell, and David [Elwell]." J.A. 137. Shortly later, Moulton questioned Colson to learn if Colson's arson of a dump truck could be blamed entirely on Gary Elwell. J.A. 142-43. As part of his plan to pin the blame on Gary and David Elwell, Moulton also discussed his ideas for an alibi defense, which depended on finding a witness who would commit perjury. J.A. 146-50.

In addition to his unprompted statements, Moulton also incriminated himself in response to Colson's questions "for dates (J.A. 114, 124), for times (J.A. 134), and a whole variety of other details (J.A. 115, 120, 125, 135)" concerning the crimes for which they were indicted. (Brief for Respondent at 12). However, Colson asked those questions in the context of planning their trial strategy, preparing the perjured testimony to be given at trial, and reviewing the discovery materials (see, e.g., J.A. 129-36, 137-51) - a situation created by Moulton. For example, when Colson asked Moulton, "What time did we break in that night [into Lothrop Ford]?" (J.A. 134), the question was in the context of going through a trial run of the perjured testimony to be given

by Colson. (Transcript of Body-Wired Meeting, dated December 26, 1982, at 96-97; J.A. 134). Moulton himself considered it important that Colson have a thorough understanding of both the true facts and the false testimony to be given at trial as shortly earlier in the conversation Moulton had accused Colson of not "know[ing] what to say, what to lie about, what to not lie..." (J.A. 133) in Colson's initial interview with the police. Moulton had also told Colson, "Well, I, I want to drill this [i.e., the trial testimony] into our fucking heads." J.A. 129. Hence, Colson's questioning and prompting of Moulton about the dates, times, and other details concerning the crimes for which they were indicted was within the role that Moulton had established for him - viz., to help

Moulton develop, prepare, and present a  
perjured defense at trial.<sup>3</sup> Colson

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<sup>3</sup> Respondent's argument that Colson's individual questions and statements constitute "interrogation" violative of Massiah (Brief for Respondent at 12-13) misses the forest for the trees. Moulton at every turn created his incriminating situation at the December 26th meeting, including setting up the role-playing that required Colson to ask him questions in order to develop perjured testimony. Moulton's statements were not "deliberately elicited" from him through Colson's questioning; rather, Moulton's statements were the inevitable product of his own actions and plans. Respondent's attempt to parse the Moulton-Colson conversation to exclude prompted statements in this context should be rejected because the Sixth Amendment is not concerned with the narrow question whether any of Moulton's incriminating statements were given in response to individual questions by Colson but rather with the larger issue whether the situation in which the statements were made was intentionally created by the government. Henry, 447 U.S. at 274; see Brief for Petitioner at 23-30; see also Kamisar, Brewer v. Williams, Massiah and Miranda: What Is "Interrogation"? When Does It Matter?, 67 Geo. L.J. 1, 41 n.272 (1978) ("We do not even know, and evidently the Supreme Court did not care, what Colson [the informant in Massiah] said or how he

was entitled to ask questions, make statements, and otherwise play this role so as to avoid exposing his status as an informant and perhaps risking his life as well. Weatherford v. Bursey, 429 U.S. 545, 557 (1977).

Given that Moulton created his incriminating situation, it makes no difference under the Sixth Amendment whether Colson's questioning of Moulton is attributable to the police. For even after Colson had become an informant, it was still Moulton who, without any prompting by Colson, consistently sought out Colson in

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said it." ). Since this larger issue can be answered in the negative here, the fact that some of Moulton's statements were in response to Colson's questions is constitutionally irrelevant. That irrelevance is underscored by the fact that many of Moulton's statements were completely unprompted by Colson (J.A. 137, 142-43, 146-50) and accordingly not subject to exclusion on Massiah grounds.

order to plan and thoroughly discuss their defense at trial. Colson's questioning therefore did not elicit or extract any statements from Moulton that Moulton was not inevitably going to make independent of Colson's relationship with the police. Cf. Nix v. Williams, 104 S.Ct. 2501 (1984).

Respondent's reliance on Beatty v. United States, 389 U.S. 45 (per curiam), rev'g 377 F.2d 181 (5th Cir. 1967), for the proposition that, notwithstanding a defendant's own creation of his post-indictment incriminating situation, Massiah is violated whenever the police or their agents play an active role in the relationship where the incriminating statements are made is misplaced. First, Beatty is a summary disposition without opinion. Such dispositions are of limited

precedential value. See, e.g., Edelman v. Jordan, 415 U.S. 651, 670-71 (1974).

Second, Respondent's reading of Beatty stretches that case far beyond both the ruling of Massiah and the facts here.

In Beatty, the defendant on his own initiative set up a meeting with the informant at which he (Beatty) made a number of what appear to have been unprompted incriminating statements about the crime for which he was already charged. Beatty, 377 F.2d at 184. The only government action in Beatty was to foster the preindictment relationship in which the informant negotiated with Beatty for the illegal transfer of a machine gun. This action was undertaken to investigate Beatty's plans to commit a crime (Beatty, 377 F.2d at 183-84) and presented the issue

of entrapment, which Beatty in fact raised (Beatty, 377 F.2d at 186-87). Although the preindictment relationship was not fostered by the government with the intent of obtaining post-indictment statements, and although after indictment it was Beatty himself who used the relationship to create his incriminating situation, this Court nevertheless found a Massiah violation.

Since the Massiah doctrine prohibits the government from generating uncounseled post-indictment confrontations of the accused (see Henry, 447 U.S. at 270-74; Massiah, 377 U.S. at 204-06), Massiah is inapplicable, however, if the defendant - e.g., Beatty, or Moulton here - has created the post-indictment situation. Moreover, since Beatty, the Court has ruled in Weatherford that the Sixth Amendment

permits an informant to protect his cover by attending and participating in a post-indictment meeting planned by the defendant. Weatherford, 429 U.S. at 557. To the extent Beatty signals a Sixth Amendment violation in circumstances like the present case where the informant, to protect his cover, participated in a meeting in which Respondent himself made his incriminating statements inevitable, Beatty should be overruled.

Regardless of Beatty's continuing vitality, the instant case is distinguishable. In contrast to Beatty where the government approached one Sirles who agreed to become an informant and negotiate with Beatty for the illegal transfer of machine guns (Beatty, 377 F.2d at 183-84 & n.4), here Colson initiated

contact with the police to complain about threatening telephone calls. Whereas in Beatty the government fostered a preindictment relationship between the informant and the accused that continued after indictment and became a situation in which Beatty made post-indictment incriminating statements (Beatty, 377 F.2d at 184), here the police did nothing to bring Colson together with Moulton, who created his incriminating situation himself independent of Colson's status as an informant.

Moreover, apart from doing anything to bring them together, and contrary to Respondent's assertion (Brief for Respondent at 13-16), the police did nothing to provide Colson with any incentives to obtain statements from

Moulton at the December 26th meeting. In contrast to the purposeful interrogation by police or their agents condemned in Massiah, Brewer, and Henry, Colson's questioning of Moulton was not part of any police plan to obtain post-indictment statements from Moulton. When placing the body wire on Colson, the police specifically instructed him "to act like himself, converse normally, and avoid trying to draw information out of Moulton." (Pet. App. 46; State v. Moulton, 481 A.2d 155, 161 (Me. 1984); Pet. App. 16; J.A. 55-57, 61-62, 87). In contrast with the government's contingent-fee arrangement with the informant in Henry, there was nothing here to cause Colson to deviate from these instructions. Indeed, the purposes of the body wire, as understood by

both Colson (J.A. 53-54, 67) and the police (J.A. 85, 87), and the police agreement not to bring any additional charges against Colson in exchange for his eye-witness testimony at Moulton's trial (Transcript of Jury-Waived Trial, Vol. II, at 293-95; J.A. 63-65) were unrelated to obtaining statements from Moulton about crimes for which he had been charged. Under these circumstances, Colson's questioning of Moulton cannot be attributed to the police.

Noting that Colson "had made no deal on sentencing for those offenses" to which he had confessed, Respondent draws the inference that Colson had "committed himself in a substantial way to the mercy of Maine law enforcement officials" who thereby gave Colson an incentive to interrogate Moulton in order "to please

those officials." (Brief for Respondent at 14). Nothing in the record, however, supports this inference. There is no evidence of any agreement or understanding that Colson would receive a more lenient sentence, or that a more lenient sentence would be recommended by the prosecutor, in exchange for Colson's obtaining post-indictment incriminating statements from Moulton. Moreover, the fact that Colson had not yet been sentenced when he met with Moulton equally supports the contrary inference that Colson had an incentive to follow the police instructions precisely - viz., to avoid drawing information out of Moulton - as a means of ingratiating himself with the police. See Henry, 447 U.S. at 285 (Blackmun, J., dissenting). With these inferences

counterbalanced against each other, and in the absence of any evidence that either Colson or the prosecutor understood that a lighter sentence would be recommended if Colson obtained post-indictment statements from Moulton, the fact that Colson had not yet been sentenced when he met with Moulton does not support Respondent's claim that Colson's questioning of Moulton should be deemed "deliberate elicitation" attributable to the police.

Respondent also claims that another part of the State's alleged plan to use Colson to elicit statements from Moulton was to oppose Moulton's motion to sever his trial from Colson's. According to Respondent, this tactic kept Moulton and Colson together in their common plight as codefendants, thereby creating a situation

in which Moulton would make post-indictment incriminating statements to Colson in the course of planning their joint defense. (Brief for Respondent at 15, 19). This argument also, however, is not supported by the record. Moulton's motion to sever was filed on October 21, 1982 (J.A. 2), approximately two weeks prior to Colson's first contact with the police on November 4, 1982 to complain about threatening telephone calls. J.A. 25-26, State v. Moulton, 481 A.2d 155, 159 (Me. 1984); Pet. App. 9-10, 43-44. No agreements were made nor any relationship established between the police and Colson on November 4th. J.A. 27-28, 73-74. Indeed, the police would not discuss with Colson any of the crimes committed by Moulton and Colson because Colson did not have a lawyer with

him. J.A. 27-28, 72-74. The next day on November 5, 1982, approximately four to five days prior to when Colson first agreed to cooperate with the police (J.A. 27-30, 73-76), Moulton's motion to sever was heard and denied. (J.A. 2). Since Colson initiated contact with the police to complain about threatening telephone calls only the day before the November 5th hearing, and since the State had not yet established any relationship with Colson when it opposed the motion to sever on November 5th, there is no basis for Respondent's claim that the State opposed the motion as part of a larger plan to use Colson to elicit post-indictment statements

from Moulton.<sup>4</sup>

Under the totality of these circumstances, neither Colson's questioning of Moulton nor any aspect of the State's relationship with Colson constituted "elicitation" under Massiah. Given that Moulton himself created his post-indictment incriminating situation and thereby made his statements inevitable independent of Colson's relationship with the police,

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<sup>4</sup> On December 9, 1982, Moulton filed another motion to sever his case from Colson's. (Docket Entries for CR-81-38 and CR-81-39). This motion was not heard, however, until April 4, 1983 - well after Colson's body-wired meeting with Moulton on December 26, 1982. The State did not oppose this motion to sever, which was granted by the court. (Docket Entries for CR-81-38).

Moulton's Sixth Amendment right to counsel was not violated.<sup>5</sup>

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<sup>5</sup> Even if Moulton's Sixth Amendment right to counsel was violated by Colson's questioning, any error from the admission at trial of Moulton's responses was harmless as the fact-finder had before it other overwhelming evidence of Moulton's guilt, including Colson's eye-witness testimony of Moulton's criminal conduct and Moulton's unprompted incriminating statements from the December 26th meeting, which are not subject to a Massiah challenge. See Milton v. Wainwright, 407 U.S. 371 (1972) (assuming arguendo a Massiah violation, that error nevertheless "was, beyond a reasonable doubt, harmless" as there was other "overwhelming evidence" of defendant's guilt); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

II. THE ADMISSION OF  
STATEMENTS OBTAINED BY  
THE POLICE IN THE  
COURSE OF A LEGITIMATE  
INVESTIGATION INTO  
SEPARATE CRIMES DOES  
NOT VIOLATE THE SIXTH  
AMENDMENT.

Regardless of the Court's disposition of the argument advanced in Part I above, the Court should still reverse the decision of the Maine Supreme Judicial Court on the ground that the police here were pursuing a legitimate new crime investigation in good faith. As discussed in our principal brief, where the police obtain post-indictment statements from a defendant as part of a good faith investigation into a separate crime, there can be no "deliberate elicitation" within the meaning of Massiah. (See generally Brief for Petitioner at 32-34, 58-60). No Sixth Amendment policy

requires exclusion of statements so obtained because (1) exclusion of such admissions will not deter police misconduct and (2) the defendant has neither a right nor a desire to have a lawyer present when he discusses his plans for committing a crime. Finally, Respondent's proposed test to determine the admissibility of such statements should be rejected for the reasons identified in United States v. Darwin, 757 F.2d 1193 (11th Cir. 1985).

A. The police body-wired Colson as part of their good-faith investigation into a plot to kill a State's witness.

The courts below found, and Respondent apparently concedes, that the police body-wired Colson as part of their legitimate investigation of a plot to kill Gary Elwell, one of the State's witnesses.

(Pet. App. 48-49; State v. Moulton, 481 A.2d 155, 160 (Me. 1984), Pet. App. 13; Brief for Respondent at 27). Once the police had information about this plot - a separate offense from the theft charges for which both Colson and Moulton had been indicted - they were obligated to investigate it by all means at their disposal, including use of undercover agents or informants. Colson could be and properly was used in that capacity. There is no dispute on any of these points. (See Brief for Respondent at 22). The dispute centers, rather, on whether, notwithstanding the legitimacy of both the police's purpose and their actions, the statements they obtained through the body-wire relating to the pending theft charges should be excluded.

Exclusion of these statements should not be required. The purpose of the exclusionary rule is to deter police or prosecutorial misconduct. See, e.g., United States v. Leon, 104 S.Ct. 3405, 3412-16 (1984) (Fourth Amendment). Absent such misconduct, there is no societal benefit gained from application of the exclusionary rule that outweighs the cost to society of exclusion of highly probative evidence. As the Court recently recognized:

The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that unbending application of the exclusionary sanction to enforce ideals of governmental rectitude would impede unacceptably the truth-finding functions of judge and jury."

. . . Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on . . . guilty defendants offends basic concepts of the criminal justice system.

. . . Indiscriminate application of the exclusionary rule, therefore, may well "generat[e] disrespect for the law and the administration of justice." . . .

Accordingly, "[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served."

United States v. Leon, 104 S.Ct. 3405, 3413

(1984) (footnote and citations omitted).

See also United States v. Janis, 428 U.S.

433 (1976); United States v. Peltier, 422

U.S. 531 (1975).

The "good faith" rationale has been adopted by several courts of appeals in holding that admissions obtained in the course of an investigation of separate offenses can be used during the trial of the indicted offense without violation of Massiah. Thus, in Grieco v. Meachum, 533 F.2d 713 (1st Cir.), cert. denied, 429 U.S. 858 (1976), the court held that a statement obtained in the course of an investigation for subornation of perjury was admissible at the trial for murder to show consciousness of guilt:

Exclusion of relevant, otherwise admissible testimony, is a remedy for past violations of the constitution. As there was no violation of [defendant's] constitutional rights in obtaining the information contained in [the informant's] testimony, we

can see no constitutionally required reason to exclude it from the trial in question. Had the government's intention been to obtain testimony against [the defendant] for use at the trial for... murder... our decision might be different. The government, however, acted in good faith in investigating another crime.

Grieco, 533 F.2d at 718. Accord, United States v. DeWolf, 696 F.2d 1 (1st Cir. 1982). The Eleventh Circuit recently followed Grieco, holding that statements relating to a pending charge can be admitted if obtained during the investigation of a separate crime so long as investigating officers "show no bad faith and do not institute the investigation of the separate offense as a pretext for avoiding the dictates of Massiah." United States v. Darwin, 757

F.2d 1193, 1199 (11th Cir. 1985). These courts have all recognized that Massiah's objective of preventing the police from deliberately seeking to obtain statements for use in convicting an indicted defendant does not require exclusion of statements when the police have no such motive.<sup>6</sup>

That recognition applies here and warrants reversal of the Maine Court's decision. The police acted in good faith for legitimate purposes - an investigation into a possible plot to murder a State's witness. No societal interest in deterring

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<sup>6</sup> See also United States v. Merritts, 527 F.2d 713, 715-16 (7th Cir. 1975); United States v. Moschiano, 695 F.2d 236, 240-43 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983); United States v. Taxe, 540 F.2d 961, 968-69 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977). But see Mealer v. Jones, 741 F.2d 1451, 1453-55 (2nd Cir. 1984), cert. denied, 105 S.Ct. 1871 (1985).

police misconduct can be furthered under these circumstances by application of the exclusionary rule. And its application would deprive the jury of relevant, reliable evidence, a societal cost that is not justified in the absence of any benefit.

B. No right to counsel  
attaches to discussions  
of subornation of  
perjury or murder.

It is anomalous at best to suggest, as Respondent does, that the Sixth Amendment requires exclusion of evidence obtained during a meeting of co-defendants at which the presence of a lawyer is neither constitutionally required nor indeed desired by the defendant. To be sure, a defendant's planning of criminal activities designed to avoid conviction at the trial of the indicted offense constitutes telling

evidence of guilt. No right to a lawyer, however, attaches to such planning. See, e.g., Darwin, 757 F.2d at 1200. The adversary system is designed to produce a fair trial. The purpose of the Sixth Amendment is to protect the adversary system by assuring that an accused has the assistance of counsel in the preparation of his defense and at the trial. E.g., United States v. Gouveia, 104 S.Ct. 2292, 2298 (1984). To enlarge that right to require the assistance of counsel to prevent a defendant from being convicted, or, more accurately, to assist him in plotting to commit a crime in order to avoid being convicted, is to turn that constitutional guarantee on its head.<sup>7</sup>

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<sup>7</sup> Moreover, it is quite obvious that the reason counsel is never present at any of these discussions is because the

Here, Respondent was not entitled to a lawyer's presence during his discussion of both the possibility of murdering Gary Elwell and subornation of (and proposals to commit) perjury, nor from the circumstances can it reasonably be said that he wanted one. Nonetheless, on the ground that he was unconstitutionally "interrogated" absent his lawyer, Respondent seeks to keep

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defendant recognizes that the lawyer would - or at the least might - report on his plans or activities to the authorities. Particularly where, as here, the defendant has a lawyer, is in regular contact with the lawyer, and easily could have had the lawyer attend the meeting, there is no basis to conclude that the State has violated his constitutional rights by not insisting prior to the meeting that his lawyer be present. See Darwin, 757 F.2d at 1200 ("[T]he right to the presence of counsel simply does not extend to a situation in which the defendant is engaged in the commission of a separate offense. Indeed, insisting upon the presence of counsel has a certain unreality.").

from the fact-finder statements he made as part of an effort to render the trial on the original theft charges a sham. These statements are persuasive and highly reliable evidence both of Respondent's consciousness of guilt and of the credibility of Colson's eye-witness testimony on the theft charges. The shield of the Sixth Amendment should not be turned into a sword for defendants to use to undermine the integrity of "the criminal justice system's truth-finding function." Leon, 104 S.Ct. at 3413.

C. Respondent's "New Crimes Test" should be rejected.

Respondent agrees that it would be proper for the police, if they were legitimately engaged in a new crimes investigation, to use his statements about

the original charges if Colson "did not act outside the scope of the justification provided by [the State's] legitimate purpose." (Brief for Respondent at 27).<sup>8</sup> Because Respondent asserts that

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<sup>8</sup> Respondent claims that the State should be required to prove by "clear and convincing evidence" that it was involved in a "new crimes" investigation as opposed to an effort to obtain statements probative of the pending charge. However, the State's burden should be the usual preponderance of the evidence standard since the State's purpose in launching the investigation can be demonstrated by "historical facts capable of ready verification or impeachment" - e.g., police knowledge of a new crime before investigating the defendant, the content of police instructions to the agent conducting the investigation, and the existence of any expressed or implied agreements between the police and the agent that would cause the agent to investigate the charged crime. See Nix v. Williams, 104 S.Ct. 2501, 2509-10 n. 5 (1984). Moreover, to the extent that a "new crimes exception" to the Massiah doctrine amounts to no more than another way of saying that the police complied with Massiah by not "deliberately" obtaining post-indictment statements, the preponderance of the evidence standard used to test compliance with Massiah is the appropriate burden of proof.

Colson questioned him about the original offense, i.e., went "outside the scope" of the State's legitimate purpose in investigating the plot to kill Gary Elwell, he argues that the State fails this test and, notwithstanding the legitimacy of the police's purpose, the statements so obtained must be excluded.

Respondent's argument should be rejected. As described in Part I above, Colson never acted as an agent of the State outside the scope of the justification provided by the State's legitimate purpose. More important, Respondent's test is itself fatally flawed in several respects.

As the Darwin court found,

Adopting the [Respondent's] position of only allowing a limited use of such evidence [i.e., use of the evidence of the separate offense in a separate trial on that charge and not at all as proof of the original offense] would in essence vindicate a right of the accused to have his counsel present while he is being investigated for a separate offense because of the possibility that he might talk about the first offense as well. We believe that Massiah does not go this far.

Darwin, 757 F.2d at 1200. Part of the Darwin court's premise was that, as this Court found in Hoffa v. United States, 385 U.S. 293 (1966), the Constitution does not protect "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal

it." Hoffa, 385 U.S. at 413. Respondent here seeks to undo his misplaced belief in Colson by proposing a test that would immunize an indicted defendant from the use at trial of voluntary admissions. The Constitution requires no such result.

Respondent's test is, in Fourth Amendment terms, like having a search warrant without the benefit of the plain view doctrine. That is, Respondent's test permits the police to "seize" statements that fall within the focus of a new crimes investigation - viz., Moulton's plans to kill Gary Elwell - but prohibits the police from seizing statements in plain view about other crimes that are not within the investigation's scope - viz., Moulton's perjury and subornation of Colson's

perjury. There is no valid reason under the Sixth Amendment, however, to distinguish between these two sets of statements. For in both cases the defendant is discussing crimes he is planning to commit and therefore neither is constitutionally entitled nor probably wants, as evidenced by Moulton here, to have his lawyer present. Hoffa, 385 U.S. 293, 304-09 (1966); Darwin, 757 F.2d at 1200. Hence, although the police here were investigating Moulton's plans to kill Gary Elwell, the Sixth Amendment did not prohibit the State from obtaining and using Moulton's statements in plain view about the separate new crimes of perjury and subornation of perjury, for which there was no right to counsel, even though these

other statements may also have related to the pending theft charges.<sup>9</sup> Since most of Moulton's statements from the December 26th meeting admitted at his trial were actually about Moulton's proposed new crimes of perjury and subornation of perjury (J.A. 113-151), for which there was no right to counsel, neither Massiah nor

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<sup>9</sup> Indeed, even statements relating solely to the original charges should be admissible under the plain view theory. Moreover, in many circumstances it will be impossible to tell whether the statement bears only on the new crime or relates to the indicted offense. Moulton's statements arose in the context of an attempt to plan the murder of a State's witness and to develop perjured testimony, still another crime. The fact that in the course of developing that perjured testimony Moulton made admissions, either directly or by implication, about the pending indicted offense was inevitable. It simply is not realistic to try to draw the kind of neat distinctions that Respondent urges here.

the Sixth Amendment barred the admission of these statements. Cf. Texas v. Brown, 460 U.S. 730, 738 (1983) ("[P]lain view" provides grounds for seizure of an item when an officer's access to an object has some prior justification under the Fourth Amendment.").

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Judicial Court of Maine should be reversed.

Dated: 9/27/85

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wayne S. Moss, Counsel of Record for Petitioner State of Maine and a member of the Bar of the Supreme Court of the United States, hereby certify that pursuant to U.S. Sup. Ct. Rule 28.3 I have caused three (3) copies of the foregoing "Reply Brief for Petitioner" to be served on the only other party to this proceeding - viz., Perley Moulton, Jr. - by depositing said copies in the United States Mail on September , 1985, postage prepaid, addressed to Respondent's Counsel of Record, Anthony W. Beardsley, Esquire, as follows:

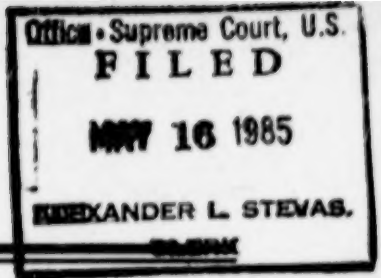
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Dated at Augusta, Maine, this 27th day of September, 1985.

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6  
No. 84-786



**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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STATE OF MAINE, PETITIONER

v.

PERLEY MOULTON, JR.

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ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF MAINE

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

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REX E. LEE

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## QUESTION PRESENTED

Whether the Sixth Amendment prohibits the use at trial of post-indictment incriminating statements made to a government informant, where the statements were made at a meeting arranged by the defendant and where the government recorded the statements as part of an investigation of threats against the informant and other prospective witnesses.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1984

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No. 84-786

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STATE OF MAINE, PETITIONER

*v.*

PERLEY MOULTON, JR.

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*ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF MAINE*

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**BRIEF FOR THE UNITED STATES  
AS AMICUS CURIAE SUPPORTING PETITIONER**

---

**INTEREST OF THE UNITED STATES**

This case presents a significant question concerning the admissibility at trial of post-indictment incriminating statements made by a defendant to a government informant. Although this happens to be a state case, the resolution of the question presented will also affect federal criminal prosecutions.

**STATEMENT**

After a jury-waived trial in the Superior Court of Waldo County, Maine, respondent was convicted on several counts of theft and burglary. The Supreme Judicial Court of Maine reversed his convictions on the ground that certain post-indictment statements made by respondent to a government informant had been improperly admitted in evidence against him.

1. Respondent and a co-defendant, Gary Colson, were indicted in April 1981 on three felony counts of theft by

receiving two stolen trucks and some automobile parts and a misdemeanor count of theft by receiving a stolen automobile (Pet. App. 2; J.A. 8-11).<sup>1</sup> On November 4, 1982, while these charges were still pending, Colson telephoned Belfast Police Chief Robert Keating and informed him that he had received threatening telephone calls regarding the pending criminal charges.<sup>2</sup> When Colson expressed an interest in telling Chief Keating about the circumstances giving rise to the theft indictments, Chief Keating told him to consult with his attorney before revealing any information about those alleged criminal activities. Pet. App. 44.

On November 6, 1982, Colson and respondent met at the home of an acquaintance and then went to another location in Belfast. At that meeting, respondent told Colson of his idea to kill Gary Elwell, a prosecution witness. Colson was to obtain a car to be used in that undertaking. Pet. App. 9-10, 44; J.A. 25-28, 30-32, 72-76, 95-96.

On November 9 and 10, Colson met with Chief Keating and Officer Rex Kelley of the Maine State Police at the office of Colson's attorney. During that meeting, Colson discussed the thefts with which he had been charged as well as the conversation with respondent on November 6 in which respondent had suggested a plan to kill Elwell. Chief Keating previously had learned that other witnesses, including Elwell, had received threats, and that one witness, Leslie Ducaster, had been threatened in person by respondent. Colson consented to the placement of a recording device on his telephone, and subsequently he recorded three telephone calls that were initiated by respondent.<sup>3</sup> Chief Keating testified at the suppression hearing that he placed the recording device on Colson's telephone because respondent was to call Colson back

<sup>1</sup> Superseding indictments were returned in January 1983 (Pet. App. 4).

<sup>2</sup> Colson testified at the suppression hearing that he contacted Chief Keating because the matter of the threatening telephone calls "had gone too far" (J.A. 26).

<sup>3</sup> Respondent's statements in these three conversations were not introduced at trial.

when plans to eliminate Elwell had been finalized and because Colson himself had been receiving threatening telephone calls. Chief Keating told Colson to act normally and just to be himself in these conversations. Pet. App. 10-11, 45; J.A. 28-29, 32-36, 50, 67, 74-78, 87-90, 97-100.

The three recorded telephone conversations covered a wide variety of subjects, including personal matters such as Colson's work with Amway, the purchase of automobiles, etc. There also was discussion of the charges pending against respondent and Colson, in light of their receipt from their lawyers of written statements obtained from the prosecution in which several witnesses incriminated respondent and Colson. See, *e.g.*, 12/2/82 Tr. 1-8; 12/14/82 Tr. 1-4, 7, 9-15, 16-17.<sup>4</sup> In addition, in the first of the recorded telephone conversations, on November 22, 1982, respondent, in an apparent reference to the plan to do away with a prosecution witness (see J.A. 88), told Colson that he had "come up with a method" and that he wanted to get together with Colson to talk about it after respondent had "work[ed] out the details on it" (11/22/82 Tr. 4). Respondent also referred to statements by several witnesses that they had been threatened (12/2/82 Tr. 4; 12/14/82 Tr. 9). In the last of the recorded telephone conversations, respondent, who was then living in New Hampshire, informed Colson that he was coming to Maine for Christmas weekend and wanted to meet with Colson on the day after Christmas (J.A. 109-112; 12/14/82 Tr. 7-8, 19-21, 23).

Chief Keating and Detective Kelley arranged for Colson to wear a body recorder during the December 26 meeting. Both officers testified at the suppression hearing that the body recorder was intended to protect Colson's safety during the meeting, in the event that respondent might have learned that Colson was cooperating with the police, and to record any information concerning threats to other witnesses. J.A. 37-39, 53-55, 67, 84-85, 87-88. Colson was

<sup>4</sup> "Tr." with an accompanying date refers to the transcript of the recorded conversation between respondent and Colson on that particular date.

instructed in connection with the December 26 meeting to be himself and to converse normally, to discuss the threats if that subject was brought up, but to avoid questioning or drawing information out of respondent (J.A. 55-57, 61-62, 77-78, 87). During the conversation, respondent in fact did bring up the issue of killing Gary Elwell, by means of poison darts or explosives (12/26/82 Tr. 18-21). Those portions of the transcript were not admitted into evidence at trial. There also was considerable discussion of developing false testimony for presentation at trial (*id.* at 13-14, 22, 26, 39-40, 44-45, 67-68, 76-77, 87, 97), although only one portion of that discussion was introduced at trial (J.A. 146-150). In addition, there was some direct discussion of the thefts for which respondent had been indicted, and the transcript of portions of the conversation containing such discussion was introduced at trial. See J.A. 113-151.

2. The trial court denied respondent's motion to suppress his statements to Colson (Pet. App. 43-49). The court recognized that under *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), post-indictment statements made by a defendant without the presence of counsel must be suppressed if they were "deliberately elicited" by the State or if the State created a situation likely to induce the defendant to make incriminating statements (Pet. App. 47-48). But the court concluded in this case that "the State did not deliberately elicit any statements contained in the recordings that relate to the crimes for which [respondent] had already been indicted" and that "the State did not create a situation likely to induce [respondent] to make incriminating statements without the assistance of counsel" (*id.* at 49). In this regard, the court found on the basis of the testimony at the suppression hearing that the State had recorded the conversations "for legitimate purposes not related to the gathering of evidence concerning the crime for which [respondent] had been indicted"—*i.e.*, "in order to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect

Mr. Colson and to gather information concerning [respondent's] plans to kill Gary Elwell" (Pet. App. 48-49).

3. The Maine Supreme Judicial Court reversed respondent's convictions, holding that his Sixth Amendment rights had been violated (Pet. App. 9-19).<sup>5</sup> It found "ample evidence" to support the trial court's conclusion that the recordings were made for legitimate purposes not related to the gathering of evidence concerning the crime for which respondent had been indicted—*i.e.*, concerns about Colson's safety and about gathering information regarding possible threats to other witnesses (*id.* at 12-13). It also acknowledged the trial court's finding that "Colson was told to try to act like himself, converse normally, and avoid trying to draw information out of [respondent]" (*id.* at 16). Nevertheless, the court held that the statements were inadmissible under *United States v. Henry*, 447 U.S. at 274, because, in its view, the police "intentionally created a situation that they knew, or should have known, was likely to result in [respondent's] making incriminating statements during his meeting with Colson" (Pet. App. 18).

#### SUMMARY OF ARGUMENT

The Supreme Judicial Court of Maine has extended this Court's holdings in *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), to quite different circumstances in which the rationale of those decisions does not apply. *Massiah* and *Henry* concerned measures initiated by the government that were found to constitute the "deliberate elicitation" from the defendant of incriminating statements pertaining to the criminal activities for which he already had been indicted. 377 U.S. at 204, 206; 447 U.S. at 270. See also *Brewer v. Williams*, 430 U.S. 387, 399-401

<sup>5</sup> The Supreme Judicial Court also reversed the trial court's dismissal of several counts on the basis of improper venue (Pet. App. 6-9) and rejected respondent's search and seizure claims (*id.* at 19-41). Those issues are not involved here.

(1977); *id.* at 410, 412 (Powell, J., concurring); *Nix v. Williams*, No. 82-1651 (June 11, 1984), slip op. 4, 8. The Sixth Amendment principles articulated in *Massiah* require exclusion of the defendant's statements in such circumstances in order to prevent "overreaching" by the police or prosecutor and to "safeguard the adversary system" (*Nix v. Williams*, slip op. 14; *United States v. Ash*, 413 U.S. 300, 312 (1973)). The far different circumstances of this case do not activate the same concerns.

Three factors in particular are significant. First, unlike the agents in *Massiah* and *Henry*, the police in this case were not "intentionally creating a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel" (*Henry*, 447 U.S. at 274). It was *respondent* who initiated each of the telephone conversations and the December 26 meeting and who thereby "created" the situation in which he made the incriminating statements. Second, in *Massiah* and *Henry* the government deliberately sought to obtain statements that were intimately connected with the crimes with which the defendant was charged. In this case, by contrast, the Supreme Judicial Court found "ample evidence" to support the trial court's finding that the police recorded the conversations for legitimate reasons unrelated to the obtaining of statements from respondent pertaining to the charges against him: to protect the safety of Colson and to investigate threats to him and other witnesses. Third, the police in this case had reasonable grounds to believe that respondent was engaged in obstruction of justice by threatening witnesses and that respondent would discuss plans to kill a witness in the conversations he initiated with Colson—factors that were not present in *Massiah* and *Henry*. A defendant has no constitutional right to the assistance of counsel when he is planning or discussing such endeavors.

There is no need for the Court to decide in this case whether any one of the foregoing factors alone would be a sufficient basis on which to distinguish *Massiah*. At least when considered in combination, these factors

strongly support the conclusion that *Massiah* should not be extended to require the exclusion of respondent's statements. There plainly was no "overreaching" by the police in this case. To the contrary, the police acted in an entirely responsible manner based on legitimate and well-founded concerns that respondent was threatening physical harm to witnesses and engaging in efforts to undermine the very adversary system that the Sixth Amendment was intended to preserve.

## ARGUMENT

### A. THE RATIONALE OF *MASSIAH* DOES NOT APPLY WHERE IT WAS THE DEFENDANT, NOT THE GOVERNMENT, WHO CREATED THE SITUATION IN WHICH HE MADE INCRIMINATING STATEMENTS

The first important distinction between this case and *Massiah* or *Henry* is that in the latter cases it was the government that intentionally contrived a situation in which it was likely that the defendant would make incriminating statements, while in this case it was respondent who initiated each of the recorded telephone conversations and arranged the December 26 meeting (J.A. 25-36, 70, 73, 84-85). The origins, holding, and rationale of *Massiah* and its progeny do not extend to these circumstances.

1. a. In *Massiah*, a government agent instructed the informant to invite *Massiah* to go for a ride in the informant's car and to induce him to talk about the crimes for which he had been indicted. An agent overheard incriminating statements made by *Massiah* and testified about them at trial. *United States v. Massiah*, 307 F.2d 62, 66 (2d Cir. 1962); *id.* at 72 (Hays, J., dissenting). On the basis of these factual premises, *Massiah* argued in this Court that the statements he made to the informant should have been excluded because he had been subjected to surreptitious interrogation by the government in violation of his right to counsel. Pet. Br. at 4, 6-10, *Massiah v. United States*. This Court agreed, but it is clear that

the Court rested its holding, as *Massiah* had rested his argument, on the fact that it was the government that set up the encounter and thereby induced him to talk. The Court's explicit holding in *Massiah* was that "the petitioner was denied the basic protections [of the Sixth Amendment guarantee] when there was used against him at his trial evidence of his own incriminating words, which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206 (emphasis added); see also *id.* at 204. The word "elicit" connotes an affirmative drawing out of information that the defendant would not otherwise be disposed to reveal.<sup>6</sup>

Moreover, the Court in *Massiah* relied on the concurring opinions of four Justices in *Spano v. New York*, 360 U.S. 315, 324-327 (1959), a case that involved protracted in-custody interrogation of the defendant without the presence of counsel. The Court described the rationale of the concurrences in *Spano* to be that reversal is required whenever a confession is "deliberately elicited" from the accused after indictment and without the presence of counsel, because a Constitution that guarantees a defendant the right to counsel at a formal trial "could surely vouchsafe no less to an indicted defendant under interrogation by the police in a completely extrajudicial proceeding." 377 U.S. at 204. The Court acknowledged that "in the *Spano* case the defendant was interrogated in a police station, while [in *Massiah*] the damaging testimony was elicited from the defendant without his knowledge while he was free on bail." *Id.* at 206. But the Court concluded that if the rule drawn from *Spano* "is to have any efficacy it must apply to indirect and surrepti-

<sup>6</sup> *Webster's Third New International Dictionary* 736 (4th ed. 1976) defines "elicit" to mean "to draw or bring out (something latent or potential), \* \* \* to call forth or draw out." The *Oxford English Dictionary* 89 (1978) similarly defines "elicit" to mean "[t]o draw forth (what is latent or potential) into sensible existence, \* \* \* to extract, draw out (information) from a person by interrogation" (emphasis in original).

tious interrogations as well as those conducted in the jailhouse. In this case, *Massiah* was more seriously imposed upon \* \* \* because he did not even know that he was under interrogation by a government agent." *Ibid.*, quoting 307 F.2d at 72-73 (Hays, J., dissenting).

Thus, the rationale of *Massiah* was that, as in *Spano*, the government had set up what amounted to an "extrajudicial proceeding" at which the defendant would be interrogated, thereby circumventing the formal trial proceedings and the constitutional guarantees that would apply in such proceedings. 377 U.S. at 204.<sup>7</sup> The finding of a right to counsel in such circumstances, the Court explained, simply reaffirmed the principle of *Powell v. Alabama*, 287 U.S. 45, 57 (1932), that a defendant is entitled to the aid of counsel during the critical period of the "proceedings" against him. 377 U.S. at 205.

b. This view of the basis and limits of *Massiah* is reflected in the Court's subsequent opinions as well. Thus, in *Brewer v. Williams* the Court described the rule of *Massiah* to be that "once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." 430 U.S. at 401. The Court in *Brewer* found a Sixth Amendment violation under *Massiah* because the detective "deliberately and designedly set out to elicit information from Williams just as surely as—and perhaps more effectively than—if he had formally interrogated him." 430 U.S. at 399. See *id.* at 400 ("no such constitutional protection would have come into play if there had been no interrogation"). The concurring opinions in *Brewer* echo this same theme that the government in that case

<sup>7</sup> See *Spano*, 360 U.S. at 325 (Douglas, J., concurring) ("[t]his is a case of an accused, who is scheduled to be tried by a judge and jury, being tried in a preliminary way by the police"); *id.* at 326 ("secret trial"); *id.* at 327 (Stewart, J., concurring) (after indictment, accused has right to counsel at every stage of "proceedings"; "[w]hat followed the petitioner's surrender in this case was not arraignment in a court of law, but an all-night inquisition in a prosecutor's office, a police station, and an automobile").

had imposed upon the defendant by means of interrogation.<sup>8</sup>

Similarly, in *United States v. Henry*, the Court stated that the question presented was whether, under the particular facts of that case, "a Government agent 'deliberately elicited' incriminating statements from Henry within the meaning of *Massiah*." 447 U.S. at 270. See also *id.* at 272, 273. In concluding that the agent did so, the Court relied on several factors: that the cellmate was acting under instructions as a paid government informant who was "charged with the task of obtaining information from [the] accused" (*id.* at 270, 272 n.10); that the informant ostensibly was no more than a fellow inmate (*id.* at 270, 273); and that the defendant was in custody at the time (*id.* at 273-274). The Court found these circumstances sufficient to support the conclusion that the informant "deliberately used his position to secure incriminating information from Henry when counsel was not present" and that this conduct was properly "attributable to the Government" (*id.* at 270). Accordingly, the Court held that the government violated the defendant's Sixth Amendment right "[b]y intentionally creating a situation likely to induce Henry to make incriminating statements without the assistance of counsel" (*id.* at 274). Thus, the Court viewed *Henry*, like *Massiah*, as a case in which the government was the moving force in the encounter and therefore could fairly be regarded as having caused the incriminating statements to be made.<sup>9</sup> See also 447 U.S. at 277 (Powell, J.,

<sup>8</sup> See 430 U.S. at 409 (Marshall, J., concurring) (defendant is entitled to have the "protective shield" of a lawyer between himself and the "awesome power" of the state); *id.* at 411 (Powell, J., concurring) (detective "initiated" conversation); *id.* at 410, 411, 412 (detective engaged in "interrogation"); *id.* at 415 (Stevens, J., concurring) (encounter was "a critical stage of the proceeding" at which a lawyer would have been "the essential medium through which the demands and commitments of the sovereign [could have been] communicated to the citizen").

<sup>9</sup> The Court did observe in *Henry* that "[i]n *Massiah*, no inquiry was made as to whether *Massiah* or his codefendant first raised

concurring) ("the government engaged in conduct that, considering all of the circumstances, is the functional equivalent of interrogation").

2. The conclusion that the rationale of *Massiah* applies only to circumstances in which the government takes affirmative steps to induce the defendant to make incriminating statements also is supported by the text of the Sixth Amendment guarantee and by this Court's decisions construing that guarantee in other contexts.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right \* \* \* to have the Assistance of Counsel for his defence." The term "defence" itself connotes a situation in which the government takes the offensive as an aspect of the "prosecution" of the accused, in the same manner as the gov-

the subject of the crime under investigation." 447 U.S. at 271-272. However, that observation reflected only a determination by the Court not to parse the dynamics of the interaction between the defendant and the informant within the context of a conversation for which the Court held that the government must bear overall responsibility. The incriminating statements concededly were "the product of this conversation" (*id.* at 271). Here, by contrast, there was no governmental contrivance to secure information from respondent, and it was he who provided the impetus behind each of the recorded telephone conversations and the December 26 meeting. The Court in *Henry* did not suggest that it was irrelevant whether the government or the defendant initiated the overall encounter. To the contrary, as we have explained in the text, the Court's holding was explicitly premised on the finding that the government intentionally created a situation that was likely to induce the defendant to make incriminating statements (*id.* at 274).

Moreover, in a footnote elaborating upon the sentence quoted above, the Court explained that although the government specifically arranged the meeting in *Massiah*, in *Henry* the government was "fortunate enough to have an undercover informant already in close proximity to the accused," and the government exploited that situation by charging the informant with obtaining information from the accused (*id.* at 272 n.10). It was this exploitation that in turn caused the defendant to confide in the informant (*id.* at 271, 274 & n.12). Thus, the explanatory footnote confirms that the quoted passage was not intended to make the fact of governmental instigation irrelevant.

ernment does at the trial itself, not a situation in which the accused himself takes the initiative in bringing about a pre-trial conversation or meeting with a person he does not even know to be a government informant. Cf. *Ross v. Moffitt*, 417 U.S. 600, 610-611 (1974). This Court's decisions reinforce that conclusion.

The Court has recognized that the "core purpose" of the counsel guarantee is to assure assistance at trial, "'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *United States v. Gouveia*, No. 83-128 (May 29, 1984), slip op. 8, quoting *United States v. Ash*, 413 U.S. 300, 309 (1973). The Sixth Amendment

embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill *to protect himself when brought before a tribunal with power to take his life or liberty*, wherein the prosecution is presented by experienced and learned counsel.

*United States v. Gouveia*, slip op. 8, quoting *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938) (emphasis added).

The Court also has "extended an accused's right to counsel to certain 'critical' pretrial proceedings" (*Gouveia*, slip op. 8). These additional situations to which the counsel guarantee attaches are "trial-like confrontation[s]" between the government and the accused (*Ash*, 413 U.S. at 314) that "might appropriately be considered to be parts of the trial itself" (*id.* at 310). In *United States v. Wade*, 388 U.S. 218, 224 (1967), the Court explained the rationale and process by which the counsel guarantee has been expanded to these additional confrontations:

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceed-

ings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings.

Accord, *Ash*, 413 U.S. at 310-311. "The Court consistently has applied a historical interpretation of the guarantee, and has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." *Id.* at 311. See, e.g., *United States v. Wade*, *supra* (lineup); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *White v. Maryland*, 373 U.S. 59 (1963) (guilty plea at preliminary hearing).

The Court's explanation of the holding in *Massiah* is rooted in these Sixth Amendment principles. In *Ash* the Court described *Massiah* as involving one such "trial-like" situation, in which "the accused was confronted by prosecuting authorities who obtained, by ruse and in the absence of defense counsel, incriminating statements" (413 U.S. at 311, 312), and the Court explained that if counsel had been present at the confrontation of *Massiah* by the government, he "could have advised his client on the benefits of the Fifth Amendment and could have sheltered him from the overreaching of the prosecution" (*id.* at 312). Indeed, as explained above (see page 8, *supra*), the Court in *Massiah* itself regarded the encounter between *Massiah* and the informant to be identical for Sixth Amendment purposes to the interrogation in *Spano*, which the Court characterized as an "extrajudicial proceeding" that was, in practical effect, a substitute for the trial itself. 377 U.S. at 204. See also *Henry*, 447 U.S. at 269 (the Court must scrutinize "postindictment confrontations" to determine whether they are "critical stages" of the prosecution). Most recently, in *Nix v. Williams*—which concerned the same interrogation that was found in *Brewer v. Williams* to constitute a violation of the Sixth Amendment under *Massiah*—the Court, as in *Ash*, described the problem addressed by *Massiah* to be one of

"overreaching" by the police (*Nix v. Williams*, slip op. 14). And the Court in *Nix* stated the underlying Sixth Amendment rule to be that the "assistance of counsel must be available at pretrial confrontations where 'the subsequent trial [cannot] cure a[n otherwise] one-sided confrontation between prosecuting authorities and the uncounseled defendant.'" *Ibid.*, quoting *Ash*, 413 U.S. at 315 (brackets in *Nix*).

The history and logic of the Court's extension of the Sixth Amendment guarantee just described do not apply where, as in this case, the defendant initiates an encounter with an undercover informant. In that circumstance, the defendant is not "imposed upon" by the government (*Massiah*, 377 U.S. at 206) and is not "brought before" a "tribunal" by the government (*Johnson v. Zerbst*, 304 U.S. at 463). Nor is he brought before an "extrajudicial proceeding" that is the functional equivalent of such a tribunal, as in the case of government-instigated interrogation or comparable elicitation of incriminating statements (*Massiah*, 377 U.S. at 204), in which the confrontation "might appropriately be considered to be part[] of the trial itself" (*Ash*, 413 U.S. at 310). By the same token, the government's willingness to have an undercover informant attend a meeting suggested by the defendant does not in any way approach the sort of "overreaching" by the government or "one-sided confrontation between prosecuting authorities and the uncounseled defendant" that led the Court to extend the right to counsel to the situations presented in *Massiah* and *Brewer*. See *Nix v. Williams*, slip op. 14; *Ash*, 413 U.S. at 312.<sup>10</sup> To the contrary, such participation by the informant may often be necessary in order to maintain his undercover status. See *Weatherford v. Bursey*, 429 U.S. 545, 557-558 (1977). In short, this Court's opinions do not support an extension of the Sixth Amendment right to counsel to a situation involving statements freely

<sup>10</sup> See Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?*, 67 Geo. L. J. 1, 44 n.286 (1978) (a "forceful argument" can be made that *Massiah* "does not reach so far").

made by the defendant after he approached the government informant. Cf. *United States v. Melanson*, 691 F.2d 579, 585 (1st Cir.), cert. denied, 454 U.S. 856 (1981). Accordingly, to hold that this case is controlled by *Massiah* would cut that case's exclusionary rule loose from its moorings in settled Sixth Amendment principles.

3. There is an additional reason why *Massiah* should not be extended to require the exclusion of statements where the defendant, uninfluenced by any governmental contrivance, proposed the meeting with the government informant. A showing that the government "deliberately elicited" the admissions or other incriminating statements from the defendant is an appropriate requirement because exclusion of such highly relevant evidence at trial can be justified only where there is a substantial basis for believing that government conduct actually caused the defendant to make uncounseled statements that he otherwise would not have been disposed to make (cf. *United States v. Russell*, 411 U.S. 423 (1973))—i.e., that the statements are fairly "attributable to the Government" (*Henry*, 447 U.S. at 270). For this reason, the Court in *Henry* was careful to distinguish the situation involving only a "listening post," such as where conversations between the accused and a third party are overheard by means of a recording device installed by the government. 447 U.S. at 271 n.9. See, e.g., *United States v. Hearst*, 563 F.2d 1331, 1347-1348 (9th Cir. 1977), cert. denied, 435 U.S. 1000 (1978). Similarly, Justice Powell explained in his concurring opinion, citing *Hearst*, that "*Massiah* does not prohibit the introduction of spontaneous statements that are not elicited by governmental action." 447 U.S. at 276.

Although this case is factually different from *Hearst* in the sense that Colson, the informant, was not a passive listener in the meeting with respondent, here, as in *Hearst*, the government itself did not create the situation in which it was likely that respondent would make incriminating statements. Respondent did that himself by initiating each telephone conversation and setting up the December 26 meeting with Colson. This case and *Hearst*

therefore are directly analogous for purposes of application of the *Massiah* doctrine. Compare *United States v. Panza*, 750 F.2d 1141, 1153 (2d Cir. 1984) ("the conversation was not attributable to the government and did not violate [the defendant's] Sixth Amendment rights").<sup>11</sup>

By contrast, in *Massiah* it was clear that the government's actions in arranging the meeting *did* cause the defendant to make the incriminating statements, and in *Henry* the Court viewed the circumstances in the limited record as sufficient to support a similar conclusion. In those circumstances, exclusion of the statements that were the product of the government's deliberate interference with the attorney-client relationship was required, despite the substantial societal cost, in order to restore fairness to the trial proceedings. See *United States v. Morrison*, 449 U.S. 361, 364-365 (1981); cf. *Nix v. Williams*, slip op. 14. But absent unusual circumstances not present here, where the defendant approaches the informant and requests the meeting, not only is there no comparable affirmative conduct by the government to *create* the situation in which the incriminating statements are made; there often will not be a firm basis for believing that whatever involvement there was by the government—here, its agreement to have the informant participate in the meeting under instructions to act and converse normally—actually had any effect on what the defendant said.

In this case, for example, there is no indication that the fact that Colson had approached the government and agreed to become an informant after he received threats had any effect on respondent's evident eagerness to dis-

<sup>11</sup> *Panza* involved the closely related situation in which a question arises as to whether the person who engaged in conversation with the defendant should be regarded as a government agent in the particular circumstances presented. See, e.g., *Thomas v. Cox*, 708 F.2d 132, 135-136 (4th Cir.), cert. denied, 464 U.S. 918 (1983); *United States v. Malik*, 680 F.2d 1162, 1164-1165 (7th Cir. 1982). If not, the conversation and any incriminating statements emanating from it are not appropriately attributable to the government for Sixth Amendment purposes.

cuss the charges against him in the December 26 meeting with Colson that respondent initiated. Nor, as a result, is there any indication that this encounter had any adverse impact on the fairness of respondent's trial. Compare *United States v. Morrison*, *supra*. It is clear that if Colson had not become a government informant until after December 26, there could be no basis whatever for finding a Sixth Amendment violation in the use at trial of statements respondent made to him on that date. If, as seems likely, Colson's status as an informant at the time of the meeting had no substantial effect on what respondent was disposed to say, exclusion of respondent's statements unfairly places the government in a *worse* position by virtue of Colson's cooperation than if Colson had not approached the police until after the conversations. Cf. *Nix v. Williams*, slip op. 10, 14. The Sixth Amendment does not require that result.<sup>12</sup>

<sup>12</sup> In *Beatty v. United States*, 389 U.S. 45 (1967), the Court, citing *Massiah*, summarily reversed a conviction where the meeting at which the incriminating statements were made to the undercover informant was requested by the defendant. However, the Court's summary disposition in *Beatty*, without an opinion, does not have the same precedential effect as a case briefed and argued on the merits. *Edelman v. Jordan*, 415 U.S. 651, 670-671 (1974). See *Snead v. Stringer*, 454 U.S. 988, 994 n.3 (1981) (Rehnquist, J., dissenting from denial of certiorari) (discussing *Beatty*); *id.* at 993 (*Massiah*, *Brewer*, and *Henry* support requirement that defendant show "functional equivalent of interrogation"). In any event, *Beatty* has not been relied upon or even cited in any subsequent opinions for the Court, and we do not believe that *Beatty* should be followed, because its result fails to withstand analysis. But see *Mealer v. Jones*, 741 F.2d 1451, 1454 (2d Cir. 1984), cert. denied, No. 84-6210 (Apr. 1, 1985); *United States v. Muzychka*, 725 F.2d 1061, 1063 (3d Cir. 1984), cert. denied, No. 83-1714 (May 21, 1984).

For the reasons given in the text (see page 7-8, *supra*), because the government does not "elicit" statements from the defendant when the defendant himself requests the meeting at which the statements are made, *Beatty* constituted a considerable extension of *Massiah*. Moreover, any inference from the facts in *Beatty* that the Court was prepared to extend *Massiah* in full measure to the mere acquisition of statements from the defendant without government provocation did not survive *Brewer v. Williams*, where the Court stated that no Sixth Amendment violation would have

**B. MASSIAH DOES NOT REQUIRE EXCLUSION OF THE DEFENDANT'S STATEMENTS WHERE THE GOVERNMENT'S ACTIONS WERE UNDERTAKEN FOR LEGITIMATE PURPOSES UNRELATED TO OBTAINING EVIDENCE CONCERNING THE CRIME WITH WHICH THE DEFENDANT WAS CHARGED**

This case is distinguishable from *Massiah* and *Henry* not only because here the defendant initiated the contact,

occurred if the government had not engaged in interrogation or its functional equivalent. 430 U.S. at 399-401; *id.* at 410, 412 (Powell, J., concurring). Similarly, in finding no Sixth Amendment violation in *Weatherford v. Bursey*, *supra*, the Court stressed that the defendant had invited the informant to the meeting and that it was necessary for him to accept the invitation in order to avoid suspicion that he was an informant. 429 U.S. at 557-558.

In *Henry*, the Fourth Circuit expressly relied on *Beatty* for the proposition that *Massiah* was not limited to circumstances in which the government induced the statements in question (*Henry v. United States*, 590 F.2d 544, 546 (1978)), and Henry argued in this Court (Resp. Br. at 19, 21-25, 34 n.12, *United States v. Henry*) that *Beatty* required the exclusion of all incriminating statements obtained by the government, even if they were not induced by it. This Court, however, did not rely on *Beatty* or even cite it, nor did it in any way endorse the view that it is irrelevant whether the defendant or the government was the moving force behind the encounter. To the contrary, the Court found a Sixth Amendment violation because the government had "intentionally creat[ed]" a situation in which it was likely that the defendant would incriminate himself. 447 U.S. at 274.

The Fourth Circuit and the respondent in *Henry* also relied on the Court's summary reversal in *McLeod v. Ohio*, 381 U.S. 356 (1965), for the proposition that the absence of inducement by the government is irrelevant. In *McLeod*, however, the defendant made the statements to police officers while riding in a car with them; the statements were not made to an undercover informant. Moreover, the state court opinion under review does not disclose how the defendant came to make the statements; the opinion instead focuses primarily on whether the accused had a right to counsel during the period after indictment but before appointment of counsel. *State v. McLeod*, 1 Ohio St. 2d, 60, 62-63, 203 N.E. 2d 349, 351-352 (1964). In any event, this Court since has understood *McLeod* as a case involving elicitation of statements by the government. See *Edwards v. Arizona*, 451 U.S. 477, 484 n.8 (1981). See also *Wyrick v. Fields*, 459 U.S. 42, 54 (1982) (Marshall, J., dissenting)

but also because the reasons for the government's response to that contact were quite different from the purposes underlying the government's actions in *Massiah* and *Henry*. In *Massiah*, the government had "instructed" the informant "to engage Massiah in conversation relating to the alleged crimes" (307 F.2d at 72 (Hays, J., dissenting); Pet. Br. at 4, *Massiah v. United States*), and in *Henry* the Court concluded that the government agent had likewise instructed the informant to obtain incriminating information from the accused that specifically related to the very crime with which he was charged (447 U.S. at 270-271 & nn. 7-8, 272 n.10). In this case, by contrast, the trial court found that the State recorded the conversations "for legitimate purposes *not related* to the gathering of evidence concerning the crime for which [respondent] had been indicted"—namely, "to gather information concerning the anonymous threats that Mr. Colson had been receiving, to protect Mr. Colson and to gather information concerning [respondent's] plans to kill Gary Elwell." Pet. App. 48-49 (emphasis added). Cf. *New York v. Quarles*, No. 82-1213 (June 12, 1984). The Supreme Judicial Court found "ample evidence" to support that finding (Pet. App. 13). This distinction is significant for several reasons.

1. The principal concern underlying *Massiah* and its progeny is that the government might engage in secret interrogation of the defendant for the very purpose of circumventing the formal trial proceedings and the assistance of counsel that the defendant would have in such proceedings. See pages 8-11, *supra*. Thus, in *Massiah* itself, the petitioner argued that the government "must deal through and not around an attorney retained by a defendant under indictment." Pet. Br. at 6, quoting 307 F.2d at 72 (Hays, J., dissenting). In *Brewer*, this concern that the government might act in deliberate derogation of defense counsel's role was heightened because it

(*McLeod* holds that "the Sixth Amendment forbids *all* efforts to elicit information \* \* \* in the absence of counsel, \* \* \* regardless of whether the technique used to *extract* information is in any way coercive" (second emphasis added)).

was found that the police violated an express agreement with counsel that the defendant would not be questioned during the ride to Des Moines. 430 U.S. at 390-391, 401 n.8; *id.* at 410, 412 n.1, 414 n.2 (Powell, J., concurring); *id.* at 415 (Stevens, J., concurring).<sup>13</sup> And in *Henry* the Court similarly concluded that the government agent had "planned an impermissible interference with the right to the assistance of counsel." 447 U.S. at 275.<sup>14</sup> Compare *Estelle v. Smith*, 451 U.S. 454, 470-471 (1981).

The Court consistently has stated the rule of *Massiah* in terms that respond to and seek to prevent the type of governmental conduct just described. Thus, in *Massiah*, the Court held that the Sixth Amendment was violated because there was used against the defendant at trial evidence of his own incriminating words "which federal agents had *deliberately elicited* from him after he had been indicted and in the absence of his counsel" (377 U.S. at 206 (emphasis added)). Similarly in *Brewer v. Williams* the Court premised the finding of a violation on the fact that the detective had "deliberately and designedly set out to elicit information from Williams" (430 U.S. at 399), and in *Henry* the Court concluded that the government violated the Sixth Amendment because it "intentionally creat[ed]" a situation likely to induce the defendant to make incriminating statements (447 U.S. at 274).<sup>15</sup>

<sup>13</sup> See also 430 U.S. at 407 (Marshall, J., concurring) ("there can be no doubt that Detective Leaming consciously and knowingly set out to violate Williams' Sixth Amendment right to counsel"); *Nix v. Williams*, slip op. 4-5 (Stevens, J., concurring).

<sup>14</sup> See also 447 U.S. at 275 n.14, quoting Disciplinary Rule 7-104(A)(1) of the American Bar Association's Code of Professional Responsibility ("a lawyer shall not \* \* \* [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter"). The Court's citation to this rule suggests that it viewed the Sixth Amendment issue in terms of a deliberate circumvention of counsel with regard to the "subject of the representation."

<sup>15</sup> Compare *Weatherford v. Bursey*, 429 U.S. at 558, in which the Court held that there was no Sixth Amendment violation because, inter alia, there was no "purposeful intrusion" by the government into the lawyer-client relationship.

The exclusionary rule announced in *Massiah* thus "serves the salutary purpose of preventing police interference with the relationship between a suspect and his counsel once formal proceedings have been initiated." *Henry*, 447 U.S. at 276 (Powell, J., concurring). But the language, origins, and function of the *Massiah* rule do not require the exclusion of statements that were obtained as the result of governmental actions that were not undertaken for the purpose of gathering information about the crimes for which the defendant had been indicted, but rather had an objectively justifiable independent purpose. The concurrent finding by the courts below that the State recorded the conversations for reasons unrelated to obtaining incriminating statements from respondents about the pending charges therefore removes this case from the ambit of the *Massiah* doctrine.

2. a. Other considerations support this conclusion as well. The fact that a person is under indictment for one crime obviously does not prevent the government from investigating other criminal activity in which he has been implicated. As part of such an investigation, an undercover informant may elicit from him incriminating statements pertaining to other criminal activity as to which charges have not been filed. And if formal charges subsequently *are* filed against the defendant arising out of the latter activity, *Massiah* does not prohibit the introduction of the previously elicited statements at the defendant's trial on those charges. See, e.g., *Hoffa v. United States*, 385 U.S. 293, 307-308 (1966); *Mealer v. Jones*, 741 F.2d at 1453; *United States v. Lisenby*, 716 F.2d 1355, 1357-1359 (11th Cir. 1983) (en banc); *United States v. Moschiano*, 695 F.2d 236, 240-241 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983); *United States v. Calhoun*, 669 F.2d 923, 925 (4th Cir.), cert. denied, 456 U.S. 946 (1982); *United States v. Missler*, 414 F.2d 1293, 1302-1303 (4th Cir. 1969), cert. denied, 397 U.S. 913 (1970). Although in such circumstances the statements may have been intentionally obtained from the defendant at a time when he had a Sixth Amendment right to counsel with regard to the then-pending charges, the

elicitation of the statements in connection with the investigation of a separate crime does not constitute the sort of direct governmental interference with the attorney-client relationship that constitutes a violation of the *Massiah* rule. Put another way, *Massiah* does not confer on a defendant against whom an indictment has been returned an immunity from normal law enforcement techniques to investigate indications of other criminal activity.<sup>16</sup>

For the foregoing reasons, it is clear that if respondent had been charged with obstruction of justice, *Massiah* and its progeny would not bar the admission at his trial on those charges of any incriminating statements recorded by the State while he was under indictment only for the theft offenses. Contrary to the holding of the Maine Supreme Judicial Court, we submit that the Sixth Amendment likewise does not require exclusion of any such incriminating statements from evidence at respondent's trial on the theft charges. When the officers received information that Colson and various prosecution witnesses were being threatened, and that respondent had propounded a plan to kill one of the witnesses, they unquestionably would have been derelict in their duty had they failed to pursue an inquiry into these matters by all proper investigative means at hand. Such means would include undercover contact with respondent in an effort to secure further information about, and to forestall consummation of, any proposed new offenses. Information uncovered in such an objectively justified investigation directed against independent offenses by respondent should

<sup>16</sup> To the extent it governs law enforcement techniques, the Disciplinary Rule for attorneys cited by the Court in *Henry* (see note 14, *supra*) likewise does not prohibit communications between an informant and the defendant with regard to suspected criminal activity for which he had not been formally charged. See, e.g., *United States v. Fitterer*, 710 F.2d 1328, 1333 (8th Cir.), cert. denied, 464 U.S. 852 (1983); *United States v. Kenny*, 645 F.2d 1323, 1339 (9th Cir.), cert. denied, 454 U.S. 828 (1981); *United States v. Vasquez*, 675 F.2d 16, 17 (2d Cir. 1982); but cf. *United States v. Jamil*, 707 F.2d 638, 646 (2d Cir. 1983).

not be excluded if relevant to the trial of charges pending at the time of the investigation.

We recognize that there is language in *Massiah* that could be read to support a contrary result, but there are material differences between that case and this one that counsel against an overbroad reading of *Massiah* in this regard. The government argued that the incriminating statements at issue in *Massiah* should not be suppressed because federal law enforcement agents had an interest in continuing their investigation of *Massiah* and his associates in order to find out the source and intended buyer of the narcotics and to uncover the full scope of the well-organized drug ring in which petitioner appeared to be involved. 377 U.S. at 206. The Court was prepared to assume that it was entirely proper for the government to continue that investigation (*id.* at 206-207), but it nevertheless held that "the defendant's own incriminating statements, obtained by federal agents under the circumstances here disclosed, could not constitutionally be used by the prosecution as evidence against *him* at his trial" (*id.* at 207 (emphasis in original)). This passage in the *Massiah* opinion does not require exclusion of respondent's incriminating statements in this case.

*Massiah* had been indicted in connection with the importation of cocaine. 377 U.S. at 202. Although the government had an obvious interest in continuing its investigation (especially in order to detect the activities of other persons who had not yet been charged), insofar as *Massiah* himself was concerned, any such investigation of the narcotics ring necessarily pertained directly to the criminal activities for which he already had been indicted. Moreover, the Court's specific holding, quoted above, was that *Massiah*'s statements "obtained by federal agents under the circumstances here disclosed" were inadmissible against him; the circumstances disclosed were that the informant had been specifically instructed to obtain information from *Massiah* about the alleged crimes. See page 7, *supra*.

The government's argument in *Massiah* to which the passage in question responds had the flavor of a post hoc

rationalization of conduct that, at its inception, in fact had as a primary purpose the obtaining of evidence for use at trial on the pending charges. If the Court in *Massiah* had fashioned an exception permitting the admission of *Massiah*'s statements on the basis of the government's assertion that it had a general ongoing interest in investigating related offenses, that exception might well have swallowed the rule the Court fashioned to prevent intentional interference with the attorney-client relationship concerning the crimes with which the defendant is already charged. But where, as here, the investigation was undertaken for reasons entirely distinct from any desire to procure incriminating statements from the defendant concerning the crimes with which he already has been charged, the question is not one of fashioning an "exception" to the *Massiah* rule. The rule itself simply does not apply. And whatever difficulty there might be in some cases in teasing out the motives for governmental action, the record in this case unequivocally demonstrates an objective basis on which it can be determined that the governmental action was not a subterfuge to circumvent the policies of the *Massiah* rule, and both courts below so found (Pet. App. 12-13, 48-49).<sup>17</sup>

<sup>17</sup> The Supreme Judicial Court characterized the trial court's finding that the recordings were made for legitimate purposes as focusing on the "motives" of the police. See Pet. App. 12, 14. The court acknowledged that this "legitimate motive" was relevant to the alleged infringement of respondent's right to counsel, but did not find it dispositive. *Id.* at 14. Perhaps some inquiry into subjective motivation is inevitable, given the problem of intentional interference to which the *Massiah* rule is addressed and the resulting emphasis in the test on whether a "deliberate" elicitation occurred. However, there is no need here to consider the relative roles of a subjective and objective inquiry into the purpose of the police endeavor, because by either measure there is "ample evidence" to support the conclusion that the recordings had a legitimate basis independent of any desire to obtain incriminating statements about the thefts (Pet. App. 12-13). Compare *New York v. Quarles*, No. 82-1213 (June 12, 1984), slip op. 6.

The Supreme Judicial Court believed that a different result was required because it was foreseeable to the Belfast Police that respondent would make incriminating statements pertaining to the

In sum, a "separate crimes" doctrine draws support from the principles of *Massiah*, establishes a clear and objective test, and accomplishes an appropriate accommodation of the defendant's interest in protecting his relationship with his attorney against interference by the government and society's countervailing interest in the investigation of crime and the safety of its citizens.

b. In accordance with the principles just discussed, a number of courts of appeals have held that *Massiah* does not apply in cases involving investigations of separate crimes. In *Grieco v. Meachum*, 533 F.2d 713, 717-718 (1st Cir.), cert. denied, 429 U.S. 858 (1976), the First Circuit held that statements by the defendant, who was under indictment for murder, offering to pay a jail-house informant \$50,000 to confess to the murder were properly admitted at the murder trial, apparently as admissions tending to show the defendant's consciousness of guilt for the murder (*id.* at 717). The court reasoned that exclusion of relevant, otherwise admissible testimony is a remedy for a past violation of the Constitution and that there was no violation of the defendant's constitutional rights in obtaining the defendant's statements concerning a separate crime, subornation of perjury (*id.* at 717-718). The court stressed, however, that the government in that case had "acted in good faith in investigating another

thefts in the course of the December 26 meeting. See Pet. App. 15-16. Foreseeability, however, is not the test. The government must have "intentionally creat[ed]" the situation in which the defendant was induced to make incriminating statements. *Henry*, 447 U.S. at 274. As we have shown in Point A, it was respondent, not the State, who created the situation here. And as we have explained in this Point B, the State's investigation did not in any event have the focused purpose of eliciting statements about the pending charges. Thus, even if Chief Keating should have anticipated that respondent would discuss the theft charges, the relevant question would be whether the State recorded the statements *because of*, rather than *in spite of*, that consequence. Cf. *Wayte v. United States*, No. 83-1292 (Mar. 19, 1985), slip op. 11. The courts below found that it did not.

crime" and that the result might have been different if the government's actual intention had been to obtain testimony for use in the murder trial (*id.* at 718). In the latter event, of course, the ostensibly independent investigation would have been a pretext for a direct intrusion into the attorney-client relationship concerning the murder charges and thus a "deliberate elicitation" of incriminating statements about those charges within the meaning of *Massiah*. Accord, *United States v. DeWolf*, 696 F.2d 1, 2-3 (1st Cir. 1982).

The Seventh, Ninth, and Eleventh Circuits have followed the First Circuit's decision in *Grieco* and concluded that *Massiah* is inapplicable in such circumstances. See *United States v. Merritts*, 527 F.2d 713, 715-716 (7th Cir. 1975); *United States v. Moschiano*, 695 F.2d 236, 240-243 (7th Cir. 1982), cert. denied, 464 U.S. 831 (1983)<sup>18</sup>; *United States v. Taxe*, 540 F.2d 961, 968-969 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *United States v. Darwin*, No. 82-5794 (11th Cir. Apr. 16, 1985), slip op. 3002-3005. But see *Mealer v. Jones*, 741 F.2d at 1453-1455. The Eleventh Circuit explained that permitting the use of the statements obtained in the separate investigation will protect the "societal interest in law enforcement," while "[b]arring use of the evidence where there is bad faith or pretext will tend to inhibit the government from overreaching and from doing indirectly what *Massiah* prohibits it from doing directly." *United States v. Darwin*, slip op. 3004-3005.

For the most part, the statements admitted into evidence in the cases just discussed related directly to the separate crime that was the subject of investigation, not the original offense with which the defendant was charged. But see *United States v. Darwin*, slip op. 3001-3002. In this case, on the other hand, the particular

<sup>18</sup> The Seventh Circuit in *Moschiano* specifically rejected the contention that *Grieco* was effectively overruled by *Henry*, observing that *Henry* "did not address the issue whether post-indictment statements relating to new criminal activity could be used to prove the charges in the pending indictment." 695 F.2d at 242 n.8.

statements introduced at respondent's trial related to the theft offenses themselves. J.A. 113-152.<sup>19</sup> But contrary to dicta in several of the opinions just discussed, that distinction is not significant for purposes of the *Massiah* doctrine.

It is of course true that statements relating to the present or future commission of a crime are not protected by any constitutional or other privilege. For that reason alone, *Massiah* does not preclude their admission into evidence at the trial on the original offense. See page 28, *infra*.<sup>20</sup> While this factor is therefore a sufficient condition for admission of statements obtained in the course of investigating other offenses by the defendant, it is not a necessary one. Application of the *Massiah* exclusionary rule turns on the basis for and purpose of the investigation, not the nature of the evidence it yields. Where, as here, the State engaged in a bona fide investigation into matters independent of the crimes with which the defendant was charged, all evidence obtained through that investigation should be regarded for present purposes as having lawfully come into the State's hands. Such evidence then may be used in any proceeding in which it is relevant. Thus, in this case, because the State properly recorded the December 26 meeting between respondent and Colson as part of an independent investigation into efforts to obstruct justice, *Massiah* did not require the exclusion at the theft trial of respondent's incriminating statements that were recorded in that investigation, whether or not those statements also constituted or referred to separate crimes.

<sup>19</sup> One portion of the transcript did touch upon the subject of producing false testimony at trial (see J.A. 146-150).

<sup>20</sup> In the present case, for example, evidence of respondent's plans to eliminate government witnesses, or to produce false testimony at trial, presumably would have been admissible at respondent's trial on the theft charges to show consciousness of guilt. See, e.g., *United States v. DeWolf*, 696 F.2d at 3; *Grieco v. Meachum*, 533 F.2d at 717.

**C. BECAUSE THERE IS NO RIGHT TO THE ASSISTANCE OF COUNSEL IN CONNECTION WITH OBSTRUCTION OF JUSTICE, THE MASSIAH EXCLUSIONARY RULE SHOULD NOT APPLY TO FRUITS OF AN OBJECTIVELY JUSTIFIABLE INVESTIGATION OF SUCH ACTIVITIES**

In this case, the Belfast Police not only were conducting a legitimate independent investigation into past threats made to potential prosecution witnesses, but they also had reason to believe that there would be discussions at the December 26 meeting of plans for further obstruction of justice by means of threats or harm to witnesses.<sup>21</sup> Such aggravating circumstances were wholly absent in *Massiah* and *Henry*.

A person has no right to the assistance of counsel in the commission or planning of a crime. *United States v. Darwin*, slip op. 3005; *United States v. Merritts*, 527 F.2d at 716. As this Court remarked with regard to the attorney-client evidentiary privilege (*Clark v. United States*, 289 U.S. 1, 15 (1933)):

The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.

See, e.g., *Grieco v. Meachum*, 533 F.2d at 718 n.4; *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1038-1041 (2d Cir. 1984); *United States v. Dyer*, 722 F.2d 174, 177-178 (5th Cir. 1983). The same principle must apply in the context of the *Massiah* rule, which also is designed to protect the attorney-client relationship. It therefore would be inconsistent with the underpinnings of *Massiah*—indeed, a perversion of *Massiah*'s right to counsel rationale—to require the exclusion of evidence of a person's incriminating statements that were the product of a good faith investigation into his post-indictment

<sup>21</sup> The police also were concerned about Colson's own safety if respondent had discovered that he was cooperating with the police.

unlawful plans and activities. That is especially so here. The future crime with which the Belfast Police were concerned in this case—obstruction of justice—is one calculated to undermine the very integrity of the adversary process and the fairness of the trial that the Sixth Amendment rule announced in *Massiah* is intended to preserve. See 377 U.S. at 204, 206; see also *Nix v. Williams*, slip op. 13-14.<sup>22</sup>

In this case, the statements that were actually introduced at trial pertained largely to the theft offenses, not to the possible obstruction of justice that prompted the investigation. But as we have explained (see page 27, *supra*), application of the *Massiah* rule turns on the nature of the investigation, not the nature of the evidence it produces. Accordingly, the legitimacy of the State's recording of the December 26 meeting must be viewed from the position of the police prior to that meeting, when they arranged for Colson to record it. There seems little doubt that the police at that time had, as a result of respondent's own actions and statements, a "reasonable basis to suspect"<sup>23</sup> that respondent would discuss

<sup>22</sup> In *Beatty v. United States*, discussed in note 12, *supra*, evidence of threats made to the government's informant in order to deter him from testifying was introduced at trial along with other incriminatory statements. See 377 F.2d 181, 184 (5th Cir. 1967). Although the Fifth Circuit relied on that factor in distinguishing *Massiah* (377 F.2d at 190), the government in its brief in opposition in this Court did not make the argument, which has since been accepted by a number of courts of appeals (see pages 25-26, *supra*), that no Sixth Amendment violation occurs as a result of the admission of statements relating to obstruction of justice because there is no right to counsel in connection with such conduct. See Br. in Opp. 5-9. There also is no indication in *Beatty* that the government had reason to suspect prior to the meeting that the defendant would discuss or engage in obstruction of justice. The Court's summary reversal in *Beatty* therefore does not constitute a considered rejection of the argument in the text. In any event, for the reasons given in note 12, *supra*, *Beatty* should not be followed here.

<sup>23</sup> See *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d at 1039 (describing the showing necessary to invoke the crime-or-fraud exception to the attorney-client privilege). Similarly, in *Clark v.*

plans to harm prosecution witnesses and thereby obstruct justice in the pending prosecution. And as it turned out, respondent in fact did discuss such plans, as well the possibility of introducing false testimony at trial. Because the courts below found that this was one of the State's legitimate purposes for the investigation, and because there is no suggestion of pretext or bad faith, respondent's statements obtained as a result of that meeting could not properly be excluded on right to counsel grounds.

### CONCLUSION

The judgment of the Supreme Judicial Court of Maine should be reversed.

Respectfully submitted.

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MAY 1985

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*United States, supra*, the Court stated that "[t]o drive the privilege away, there must be 'something to give colour to the charge;' there must be '*prima facie* evidence that it has some foundation in fact.'" 289 U.S. at 15, quoting *O'Rourke v. Darbishire* [1920] A.C. 581, 604. See also *In re Sealed Case*, 676 F.2d 793, 814 n.84 (D.C. Cir. 1982). In light of past threats in this case, the State's concerns plainly had "some foundation in fact." See also *In re International Systems & Controls Corp.*, 693 F.2d 1235, 1242 & n.11 (5th Cir. 1982); *In re Sealed Case*, No. 84-5388 (D.C. Cir. Feb. 8, 1985), slip op. 7-8 & n.3.